MERICAN BAR ASSOCIATION JOVRNAL

ARCH 1941

PAGE ON WILLS

LIFETIME EDITION

COMPREHENSIVE . . . SCHOLARLY . . . UTILITARIAN

Page treats every phase of the subject . . . Includes the statutes as well as the decisions . . . Footnotes classify the authorities according to states . . . Most complete collection of forms . . . Covers all law review articles on the subject of wills . . . All thoroughly indexed

The text has been entirely rewritten and expanded in scope so that this edition is twice as large as the 1926 edition. Many new problems are treated for the first time in this edition. Others have been worked out in greater detail than ever before. To mention a few:

(1) Power of the legislature over prior wills.

(2) Effect of appointment in the will of attorneys, agents, etc.

(3) Power of testator to dispose of his dead body.

(4) Wills of soldiers and sailors (given in great detail).

(5) Jurisdiction to admit a will to probate as affecting collateral attack.

(6) Effect of failure to file will.

(7) Evidence and presumptions of death and of survivorship in death in common disaster.

(8) Lapse in reciprocal wills.

(9) Whether an insane delusion, undue influence, and the like may affect a part of the will but not all.

FIVE VOLUMES - - TO BE KEPT TO DATE WITH POCKET PARTS

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In This Issue

Our Cover—With this issue we begin a series of covers showing the ten Chief Justices of the United States. The current picture of John Jay, the first Chief Justice, is a reproduction of the Gilbert Stuart painting which was painted in 1794 and is still owned by the Jay family. The concept of the Federal Government made up of its separate and independent Departments needs to be constantly reaffirmed. The symbol or design showing the three Departments forming an arch holding up the structure of the Union, with the Supreme Court as the keystone, carries out that concept in a graphic way. And graphic symbols sometimes are remembered when wordy argument is forgotten.

Authentic Legal History—The practice of reproducing on the cover authentic pictures of historical interest, particularly matters of interest to the Bar, has been well received by our readers.

The picture of the "Supreme Court in 1865" on the cover of the February Journal was generally commended and produced what might be called "fan mail" from Alaska to Florida. The names of the justices in that picture (omitted by oversight) are as follows, left to right: DAVIS, SWAYNE, GRIER, WAYNE, CHASE, NELSON, CLIFFORD, MILLER, FIELD.

The rare photograph of "Lincoln's Inauguration" on the January cover, and the unusual pictures of early inauguration ceremonies inside that issue, together with the article on inauguration protocols attracted favorable attention. Copies of some of the pictures and excerpts from the article appeared widely in the press.

Civil Procedure and Rules of Court—G. Dexter Blount of the Denver Bar is perhaps the leading figure in the recent campaign which secured the adoption in Colorado of the Rules of Court for Regulation of Civil Procedure. The story of how the battle was won in that state will be read with interest by the profession in every other state.

"Diversities of the Law"—It is particularly necessary in a time like the present to keep our sense of proportion about our profession and to keep our sense of humor fresh and keen. The cartoon "An Astute Lawyer," which we publish in this issue, is one of a group which the JOURNAL's representative stumbled upon in an old book store in the East. There are several others of equal interest. The idea of "Diversities" of the Law is deeply ingrained in our profession. Lawyers have always enjoyed spoofing themselves. And in the Law, as in other fields, it is still true, as was said by Horace: *"For a man learns more quickly and remembers more easily that which he laughs at, than that which he approves and reveres."*

The cartoonist "Spy," who drew this sketch over 60 years ago, was a famous character in London journalism, during the past century. Mallet's "Index of Artists" lists him as "a well-known cartoonist" who lived in London from 1851-1922, his real name being Sir Leslie Ward.

Dean Leon Green—In 1929 Col. John H. Wigmore was succeeded as Dean of Northwestern University Law School by a Texas lawyer, turned law-teacher, by the name of Green. Professor Green has for many years been known as one of the leading law school deans of the country. His article in this issue "The Law Student 1941," discusses a topic of wide interest to lawyers everywhere.

London Letter — Our London correspondent mailed his letter in England on December 9. It reached the JOURNAL office on February 9. Where the manuscript spent those two months is an intriguing guess—made all the more intriguing by the several clipped-out parts of the sheets, the work of the censor. In the future years (and there *will* be a future in spite of the foreboding times), these "London Letters" which we have been publishing during recent months will be a source-book for legal historians.

Fire Insurance Policy Codification—The standard form of fire insurance policies is tending toward codification in many states. Bills for that purpose have been introduced in the current legislatures of many states including (as we are advised) New York. Professor George Washington Goble of the University of Illinois Law School, who is regarded as an authority on insurance law, has had a prominent place in that campaign. His article on the subject in this issue will be generally recognized as a sort of "standard authority" by lawyers interested in fire insurance law.

Symposium on Administrative Law—We make a special feature in this issue of the important subject of Administrative Law. Our symposium on that subject includes a consideration of the work of the Association's Committee on Administrative Law, over the last several years; the Report of the Attorney General's Committee; the so-called "Additional Views and Recommendations" of Chief Justice Groner and certain other members; a study of the Walter-Logan Bill veto message by Dean Roscoe Pound; and an Analysis of the proposed new legislation in Congress. No more important subject has engaged the attention of the Bar of the country in a long time. Congress is expected to pass some sort of legislation at this session in lieu of the Walter-Logan Bill, and in light of the Report of the Attorney General's Committee. An accord of professional opinion, or at least a substantial agreement by the majority of the profession on general principles, is desirable. It would do much to facilitate prompt and effective action by Congress.

Style and Format. *"Le style est l'homme méme,"* said Buffon in his famous address to the French Academy. That is, "Style is the man, or thing itself." Such a doctrine applies equally to a Law Journal. The JOURNAL's appearance, inside and out, is intended to reflect that idea. The concept of style as a part of the substance itself, is a powerful factor in creative work. It is an idea which has been largely neglected by a large part of our profession—though a few excel in it. The English lawyers as a class appreciate the potentials of these things more than we do. Indeed the same thing may be said of the Doctors in America; both in their daily work, and in their creative writing, style and method are given a major place. On the other hand, it may fairly be said of the average lawyer's writing (such as his Briefs and his Opinions) what the Lord answered to the lamentations of Job:

> "Who is this that wrappeth up his sentences in such unskilled words?"

AMERICAN BAR ASSOCIATION
MARCH 1941 JOVRNAL VOL. 27 NO. 3

CURRENT EVENTS

Good Work of ABA Committee Recognized

THE work, during recent months, of the *Special Committee on Improving the Administration of Justice*, of which Judge John J. Parker, of Charlotte, N. C., is Chairman, has been attracting wide and favorable attention in the public press. A few significant examples will be of interest. The Washington Post, on January 8, carried an extended editorial, entitled *"The Quality of Justice,"* commending particularly Judge Parker's Committee and the campaign of the American Bar Association to modernize the rules and practices of the state courts. The Chicago Journal of Commerce, on January 11, had a full-column editorial on *"The Layman and the Law"* paying tribute to Judge Parker and his Committee, and praising the Association and its "Committees of Experts—who have brought together in one body of rules, improvements in practice which are now in effect in many states." The Herald-Tribune of New York City, in its issue of January 5, had a leading editorial entitled *"Improving Court Procedure,"* commending the work of Judge Parker's Committee and concluding:

"The Bar Association is to be congratulated on the improvements it has already secured in the direction of simplifying and standardizing procedure in the various states, and it is to be hoped that the good work will continue."

The New York Times in an editorial on January 3, on *"Improvement of Justice"* commended the work of this Committee in popularizing the Federal Rules and said: "It is desirable that the State Courts, dealing with the greatest body of litigation, should have substantially the same rules as the Federal Courts. . . The Federal Rules represent the best practice found in all the states."

The work of the Committees of the Association is often long-continued and burdensome on the Committee members. It is gratifying to find such a high estimate placed on the work of the Association, through one of its major Committees.

Bill of Rights Review

THE second number ("winter 1941") of the *Bill of Rights Review*, published by the Bill of Rights Committee of the ABA, is at hand. The Editor is John E. Mulder, Professor of Law, University of Pennsylvania, Law School; the Business Manager, Joseph Harrison of Newark, N. J., former Secretary of the Junior Bar Conference. The Publication Office, from which copies may be secured, is 31 Nassau St., Room 1110, New York City. The major articles in the present issue are:

1. *"The Constitutional Rights of Aliens,"* by Reuben Oppenheimer, of the Baltimore Bar.
2. *"Civil Liberties in Canada During War Time,"* by F. A. Berwin, of the Toronto, Canada, Bar.
3. *"Teaching Civil Liberties in the Law Schools,"* by Harry Schulman, Professor of Law, Yale Law School; and Herbert A. Fierst, member of the New York City Bar.

Legal Research into Colonial Court Records

The JOURNAL is recently in receipt of an interesting Monograph on "Early American Court Records" which shows in a striking way that extensive quantities of early Colonial Court records are still preserved, from Maine to Florida, most of which has never been published or even carefully examined. The Monograph is "No. 4 of Series 1, Anglo-American Legal History Series," published by New York University School of Law. It is the result of "a tour of the court archives from Maine to Florida," made by Richard B. Morris, Professor of History in the University, and consists of his "field notes" on that trip. The Monograph contains a "Foreword" by Francis S. Philbrick, Professor of Law at the University of Pennsylvania, which begins as follows:

"The field of American legal history is vast and almost untilled. A hundred workers might labor in it side by side for years without encroaching on each other's subjects. Substantial and steady progress will be possible in its cultivation if historians and lawyers will cooperate—and their cooperation is increasing; and if our better law schools will encourage graduate study in legal history—and a very few have begun to do so."

Some details from the Monograph will illustrate its contents and their intriguing interest. In Maine some of the Court files in York County have already been printed from 1636 to 1668; while others quite as early, which have never been published, are inventoried. In Massachusetts the court records of *"Old Norfolk County"* (now at Salem) from 1648 to 1681 have been partly printed, while others equally ancient in other counties are listed but unprinted. In New York the court records in a large number of counties are listed as unprinted, some of them going back as far as 1646. In Virginia court records are listed as far back as 1632.

The JOURNAL has frequently noted the need for greater interest by the Bar in Legal and Historical Research. Here is a bit of Res Gestae evidence along those lines.

Inter-American Bar Association Havana Meeting

March 24-28, 1941

THE January issue of the JOURNAL, page 1, carried an item announcing the meeting of the Inter-American Bar Association in Havana, March 24-28. The February issue, page 128, contained a further announcement of this meeting together with the list of subjects to be discussed. The agenda, for the meeting together with details as to associations to be represented and individual delegates who are expected to attend, or other information may be secured from the Secretary-General's Office, 3016 43rd Street N. W., Washington, D. C.

Mid-Winter Meeting of the House of Delegates

THE Mid-Winter meeting of the House of Delegates of the Association will be held in Chicago, March 17 and 18. The meeting will be held at the Edgewater Beach Hotel, the first session convening Monday, March 17, at 10 o'clock. The calendar for the meeting follows:

Preliminary Matters

Roll Call

Report of the Committee on Credentials and Admissions, Morris B. Mitchell, Chairman, State Delegate from Minnesota.

Approval of the Record.

Statement of the Chairman of the House of Delegates, Thomas B. Gay, Richmond, Va.

Report of the Treasurer, John H. Voorhees.

Report of the Committee on Rules and Calendar, Chauncey E. Wheeler, Providence, R. I.

Report of the Board of Governors to the House of Delegates, Harry S. Knight, Secretary.

Offering of Resolutions for Reference to the Committee on Draft.

Unfinished Business

Report of the Committee on Professional Ethics and Grievances, in re recommendation of Section of Patent, Trade Mark, and Copyright Law; Hon. Orie L. Phillips, Chairman.

Report of the Committee on Unauthorized Practice of the Law, in re recommendation of Section of Patent, Trade-Mark and Copyright Law; Edwin M. Otterbourg, Chairman.

Report of the Committee on Commerce, in re recommendation of Section of Patent, Trade-Mark and Copyright Law; Oscar C. Hull, Chairman.

Report of the Committee on Ways and Means in re Articles of Incorporation for American Bar Association Endowment; Howard L. Barkdull, Chairman.

Report of the Section of Criminal Law in re federal election laws; James J. Robinson, Chairman.

Report of Section of Real Property, Probate and Trust Law, in re resolution concerning abolition of dower and curtesy.

Report of Section of Taxation in re recommendations of Section of Municipal Law; George M. Morris, Chairman.

New Business: Reports of Sections and Committees:

Patent, Trade-Mark and Copyright Law, Loyd H. Sutton, Chairman.

Taxation, George Maurice Morris, Chairman.

Commercial Law, John M. Niehaus, Jr., Chairman.

Legal Education and Admissions to the Bar, W. E. Stanley, Chairman.

Junior Bar Conference, Lewis F. Powell, Jr., Chairman.

National Defense, Edmund Ruffin Beckwith, Chairman.

American Citizenship, Joseph P. Gaffney, Chairman.

Bill of Rights, George I. Haight, Chairman.

Improving the Administration of Justice, Hon. John J. Parker, Chairman.

Public Relations, Raymer F. Maguire, Chairman.

Administrative Law, O. R. McGuire, Chairman.

Labor, Employment and Social Security, William L. Ransom, Chairman.

Aeronautical Law, Mabel Walker Willebrandt, Chairman.

Judicial Salaries, Walter S. Foster, Chairman.

Judicial Selection and Tenure, John Perry Wood, Chairman.

Legal Aid Work, Harrison Tweed, Chairman.

Economic Condition of the Bar, John Kirkland Clark, Chairman.

Admiralty and Maritime Law, Cody Fowler, Chairman.

Other Matters:

Presentation of any matters which any state or local bar association or any affiliated organization of the legal profession wishes to bring before the House of Delegates.

Presentation of any matters which any Section or standing or special committee of the Association wishes to bring before the House of Delegates.

Report of the Committee on Hearings, Hon. Alva M. Lumpkin, Chairman.

Report of the Committee on Draft, John Kirkland Clark, Chairman.

Unfinished business.

New business.

Adjournment.

Additional Law List Approved

THE Special Committee on Law Lists announces the approval of the 1941 edition of Kime's International Law Directory.

Other law lists whose 1941 editions have been approved by the Committee were announced in the November, 1940 and December, 1940 issues of the JOURNAL.

STANLEY B. HOUCK, Chairman.

American Law Institute Council Meets

THE Council of the American Law Institute held its mid-winter meeting in New York City, February 17 to 22, 1941.

The first work of importance was the Proposed Final Draft of the Restatement of Security. If approved by the Institute at its May meeting, this will appear next year as the sixteenth volume of the Restatement. It covers Liens, the Pledges and Suretyship. Much of the material has been before annual meetings in previous years. The new material this year covers Party Beneficiaries in Suretyship, Official Bonds and Bonds in Judicial Proceedings.

There was discussed at the annual meeting in 1940 the "Youth Court Act" which had to do with the treatment of youthful offenders. This proposed statute aroused great interest when presented last year and has been the subject of a large amount of public discussion since. It will be presented in revised form for approval at this year's annual meeting.

The Institute is also engaged in drafting a Model Code of the Rules of Evidence. Parts of the Code have already been before the Council and annual meeting at previous sessions. This year six further chapters were added. They cover questions of Extrinsic Policy, Expert and Opinion Evidence, Hearsay Evidence, Proof of Writings, and the always troublesome questions of Presumptions and Judicial Notice. Practically all of the chapters are full of highly controversial material. The Council made a great many suggestions to the Reporter and many more are expected when the Tentative Draft of the entire Code is offered for consideration at the annual meeting.

For the first time material is presented in the Restatement of Judgments, work upon which was begun last spring. The Reporters for this subject are Professors Austin W. Scott and Warren A. Seavey of the Harvard Law School. The Restatement in this subject is of particular interest and importance for two reasons. One is the inherent difficulty of many of the questions. The other is the comparative lack of critical material in this field as in many others in the law. The first batch of material covers "Form of Adjudication" and deals with the many problems of res judicata. The other deals with the subject of Parties.

The Council directed all of this material to be sent to the annual meeting which will be held, as usual, at the Mayflower Hotel in Washington in May. The dates fixed were May 6, 7, 8, and 9.

ADMINISTRATIVE LAW SYMPOSIUM

THERE is hardly an individual in the United States who in one way or another has not felt the force and burden of what is called Administrative Law. One of the most pressing problems before the Bar of America, and immediately before Congress, is to determine the extent to which judicial process shall be exercised in the domain of Administrative Law and the method by which that process will be carried out. The question has been brought to issue by the veto of the Walter-Logan Bill, and by the coming down of the Report of the Attorney General's Committee on Administrative Procedure. It is for this reason that a large part of the March issue is devoted to this important topic. It is believed that the facts and issues on this subject should be fully presented to the profession in order that the Bar of the country may understand these matters and may make its influence felt on their solution. Reprints of this Symposium, either single copies on in bulk, will be furnished at cost.—Ed.

THE PLACE OF THE JUDICIARY IN A DEMOCRATIC POLITY*

An Examination of the Walter-Logan Bill Veto Message.

By Roscoe Pound

A RECENT veto message has read a lecture to the organized lawyers of America and told the judges to confine the judicial process to cases "appropriate for its exercise." This message is so thoroughly in keeping with the Marxian idea of the disappearance of law, now much in fashion, and so much in the spirit of the absolute ideas which have been making headway all over the world in the past two decades, that it deserves to be made the text for a discussion of the place of the judiciary in our democracy. It is not my purpose to discuss the particular measure which called forth this message. Such a measure is difficult to draw, and in spite of all the care devoted to it by able lawyers it is not unlikely that it was open to specific objections. But the message attacks the whole purpose of the measure and of any measure which may be designed to make effective and available to the ordinary citizen the constitutional guarantees against arbitrary and high-handed official or governmental action. What I wish to consider, therefore, is its attitude toward the law, toward constitutional limitations and guarantees, and toward the judiciary—in short, toward the characteristic American legal-political polity which had been developed in this country under our constitutions.

In this consideration of the attitude of the message toward law and the judiciary it is not necessary to consider the conventional jibes at the profession as being in a conspiracy with sinister interests, preferring shrewd play upon technical rules to the substance of controversies, and juggling cases rather than getting down to the merits. What has been done to eliminate such things from the judicial administration of justice has been chiefly the work of the very association against which these time worn charges are made, and I need say no more about them.

Whether well or ill carried out, and at any rate carried out with no assistance from and indeed in spite of opposition from administrative agencies and the advocates of allowing them absolute powers, the purpose of the measure was to make available to people generally by means of a simple, expeditious, relatively inexpensive procedure, what is guaranteed to them by the constitution. Partly for reasons going far back in the history of our procedure and partly because the setting up of administrative tribunals and agencies on a large scale has been going on gradually for fifty years or more by legislation planned on no system and treating each agency as if it were not a part of any general scheme of administration, but something to stand by itself, the means of securing due process of law from infringements in administrative proceedings, both as to federal agencies and in the states, had become complicated, cumbersome, often highly technical, too often unnecessarily expensive, and too often dilatory. As a result, only litigants of means with ample legal counsel at hand could in ordinary cases avail themselves of the rights which the constitution sought to secure to them. In the great majority of cases individuals deprived of their rights could not afford to undertake the proceed-

*An address delivered January 25, 1941, before the Judicial Section of the New York State Bar Association in New York City.

ings appointed to vindicate them and in too many cases they were in that way constrained to consent to or acquiesce in deprivation of important rights. Moreover, in many cases the remedy was a suit in equity in which all the evidence had to be taken over again and there was grave danger that the discretion of the court would be substituted for that of the administrative agency. It was to remedy this situation, to safeguard guaranteed individual rights and at the same time safeguard legitimate exercise of administrative discretion, to impose procedural checks designed only to secure full and fair hearing, action on the basis of evidence of rational probative force, and such a record and findings as would disclose what was done and on what basis, that the American Bar Association had been working for years. These things were not new requirements. They were well established as required by well understood provisions of the constitution. But the means of securing them were largely illusory, and this was sought to be corrected.

The Bogie of "Legalism"

Now what are we told about this purpose? First, we are told that it is characteristic of administrative tribunals that simple and non-technical hearings take the place of court trials and that a common-sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence; that an informed and expert tribunal renders decisions that look forward to results rather than backward to precedent. No one urges that an administrative hearing or investigation be conducted in all respects as a trial at law. No one has objected to any reasonable informality or application of common sense to the ascertainment of facts. But the abuses, well known to the profession and ignored by the message, to which the measure in question was directed go much deeper. To a less degree in some but to an alarming degree in other of our administrative agencies, there has been a disposition to ignore two maxims which have long been held fundamental in justice; (1) that no one is to be judge in his own case, and (2) that both sides of a controversy shall be heard and that no one shall be prejudiced by an adverse determination without an opportunity of being fully heard and without being fully heard and fully apprized of what may be used against him in reaching a decision and allowed to argue with respect to it, if he desires to take advantage of the opportunity. To say that these elementary requirements of justice are "technical legalism" and that seeking to make available to all who are adversely affected the constitutional guarantee that a decision against them shall have a basis in evidence of rational probative force and not in prejudice, preformed opinions without hearing the other side, gossip and made to order interviews under the name of investigation, is insistence on applying "technical rules of evidence," is simply to say that all rights are to be at the mercy of administrative agencies. Looking forward to results on the part of an informed tribunal, if the tribunal, as has happened in the case of some recently, considers itself informed without the hearing that the statute creating it requires, is a looking backward to the methods of the administrative tribunals of the Stuarts. Nor does it help to justify such things to pronounce these tribunals expert. As I have said on other occasions their expertness has for the most part been *ex officio*.

Secondly, we are told that not to give these tribunals a free hand, leaving them subject only to review by proceedings which most men cannot afford and in which procedure is not unlikely to defeat effective review if it cannot be defeated by the difficulties of getting a real record of the administrative proceeding—that not to leave administrative agencies at large in this way is technical legalism. Note what it is that is thus stigmatized. It is legalism to require such tribunals to keep within the limits of the jurisdiction and powers given them by the statute creating them. It is legalism to require them to take the policies they apply from the Act of Congress under which they sit and not from their own ideas of particular cases. It is legalism to require them to apply the standard provided by statute instead of making one of their own or acting on no standard. It is legalism to require them to find the facts upon which they base their orders, as all other tribunals are required to do, so as to have some minimum of check upon them.

The Bogie of Attack Upon Administration

Third, we are told that the attempt to give constitutional guarantees some real efficacy is an attack upon administrative tribunals by lawyers who are not reconciled to their existence and is one of repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation. But the simple appeal instead of the suit in equity or application for mandamus, or certiorari, which has to be brought under the present practice is relieving processes of government from lawsuits. Let me repeat, the question is not whether administration shall be constrained to due process of law. According to the constitution it is so constrained. The question is whether that constraint shall be made available to all who need to invoke it or shall remain generally inaccessible except to the litigant of exceptional means. It cannot be an attack upon these tribunals to believe that they can operate, as all other governmental agencies do, within the limits of due process of law and that they can apply the law laid down for them by Congress and the policies prescribed for them by statute instead of being free to make their own or proceed without any. If these tribunals can only act effectively by acting without law we shall have to remake our whole polity. Indeed, some of the advocates of administrative absolutism concede this and one at least argues for a fourth department of government, the administrative, in which all the powers of government, legislative, executive, and judicial are to be reposed. This is at any rate an honest program of subjecting us to the uncontrolled action of bureaus and board and commisssons.

It cannot be repeated too often. Lawyers who believe that constitutional guarantees ought to be made effective against administrative action have no thought of doing away with administrative agencies or cutting down their lawful powers or hampering them in the exercise of discretion committed to them. But there are other things in our polity to be considered besides these agencies. A fundamental idea of our polity is one of balance. The balance between efficient operation of these agencies and securing of individual rights is quite as important as the aims of the several agencies, unless, indeed, we hold, as do some of the proponents of administrative absolutism, that rights are an obsolete

archaism and that individual rights are negligible in these connections.

As to the final objection urged in the message that the attempt to hold administrative agencies effectively to the limits imposed by due process of law and by the statutes creating them would subject the administrative process to never ending lawsuits, the experience of the profession provides a ready answer. We know the result of subjecting the action of a judicial tribunal to an effective proceeding for review. In the same way one need not doubt that when effective review of administrative proceedings is provided, the cases in which such review will be called for will be relatively much fewer than they are today. The check of responsibility to hew to due process, proceed on grounds of rational probative value, and keep within legal limits will suffice in the great majority of cases.

Constitutional Democracy

I have spoken thus far assuming the American conception of law as governing all action public and private. But of those who argue for the doctrine so adroitly presented in the veto message many of them go upon a different assumption. They hold that our American conception of law as applicable to the operations of government and of the role of the judiciary is out of line with a democratic polity and that attempts to make law effective as to governmental agencies or to make the role of the judiciary achieve its purposes better are a turning back of the clock the hands of which are coming round to absolutism.

Democracy is a form of government, and any form of government may be carried on according to law or without law; it may be a legal order operated equally, predictably and uniformly or it may be absolute. Law is a word of more than one meaning. What it must mean in the present connection is a body of authoritative grounds of or guides to determination, a body of rules, principles, conceptions, and standards, developed and applied by an authoritative technique. It is true there are some today who seek to appropriate the good will which attaches to the term "law" as it had long been used in the foregoing sense, for the judicial and administrative processes however exercised. By using the term law for these processes themselves rather than for authoritative guides for exercising them, it is sought to be made out that whatever is done by those who wield the authority of a politically organized society, without regard to how they do it, whether in accord with received precepts developed by a received technique or without regard to precepts or technique as a matter of individual will for the time being, is law. At any rate, they urge that in the nature of human psychology we may not expect to subject the action of officials except in illusory appearance to precepts applied by a technique, and so if what they do, no matter how they do it, is not law, then there is no law. This mode of thinking both in its origin and in its content is closely connected with Karl Marx's doctrine of the disappearance of law—that in the ideal society of the future there will be no law. As a leading exponent of the doctrine formulated it, there will be no law, or rather only one rule of law, namely, that there are no laws but only administrative ordinances and orders.

Any sort or form of government, an autocracy, a limited monarchy, a republican democracy, or a simple democracy doing all things by town meeting and referenda, can operate according to law, or without law but through laws, or without either law or laws through administrative orders. For we must not yield to those who assert that law is a mere aggregate of laws. Law is something that gives vitality to rules of law and makes it possible to use them as instruments of justice. It develops laws to meet situations which the lawmaker forgot or never knew or did not appreciate. It limits laws to their reason and spirit when the lawmaker fails to pursue his end with exactness. It supplies gaps in the lawmaker's scheme when he fails to pursue his end with completeness. Law has continuity while rules of law are set up, decay, and are abrogated. It has a vitality and tenacity that survives repeal of laws. One may know every rule of law which obtains in the time and place and yet not know what to do with them unless he knows law. Laws are relatively simple things. Law is complex. It involves a regime of adjusting human relations and ordering human conduct. It involves a body of precepts including more than rules of law; with principles, conceptions, and standards, which are at least no less important, and along with them a received authoritative technique and received ideals. It involves finally a judicial and an administrative process, which are a significant part but by no means the whole, although this is argued for by some who dub themselves advanced thinkers in the advance all over the world, if advance it is toward absolutism. Our colonial governments in America had many laws, especially in New England. It was a long time before they had much law.

Until the recent turn over in Russia, attempt to govern without law by administrative orders, the doctrine of disappearance of law, was taken seriously. It was assumed that with the abolition of property classes would disappear and so there would be no need for law. Law was taken to be a result of private ownership of property—a device for keeping one class in subjection to another. With no disputes about property to require law, the other possible disputes, it was assumed, would be so simple that administration could take care of them as involving each a unique situation and so each to be treated as it occurred without need of law. But this had to be given up and its principal exponent, the former juristic and economic adviser of the Soviet government, is no longer with us. He could not change fast enough to meet the exigencies of setting up a new regime.

No simple democracy, proceeding by referring everything to the body of citizens at each crisis of political action, is possible except in a very small-scale state. Even Switzerland operates chiefly as a federal republic. All experience shows that a domain of continental extent has always been ruled either as an autocracy or as a federal government. What we have to think about, then, in this country is the alternative of an autocracy or a federally organized democracy. We set up a federal organization of democracies with the powers of politically organized society distributed between them and the federal government and within each a parceling out of its powers among separate departments. A federal government implies balance It presupposes a balance of nation and state, of state and neighborhood and locality, of the political organization and the individual, and of the general security and the individual life. This condition of balance requires a constitution which is the supreme law of the land; a constitution to which all disturbances of the balance can be referred and an authority empowered to apply the constitution and maintain and restore the balance. In other words, it requires law and law requires judges. Laws may be

administered without judges, as was the case in archaic systems. Law must be administered by judges trained in the technique of development and application, without which laws will not suffice for a mature social and economic order.

With us the balance was attained through distribution of the powers of government, or, as we call it, the separation of powers. This separation of powers has been under violent attack by the proponents of administrative absolutism and between the lines of the veto message seems to be included in the epithet of technical legalism. But administrative tribunals and agencies and committing to them of the manifold subjects to which recent legislation has extended their authority do not in themselves require any giving up of the separation of powers. The turning over of many subjects to administration as contrasted with the last century, which had a tendency to commit as much as possible to adjudication, does not, as some have assumed, necessarily contravene or infringe the regime of separation of powers which has been fundamental in our constitutional polity since our first constitutions were framed on the morrow of the Declaration of Independence. The constitution does not require a rigid analytical classification in which every conceivable activity of government is assigned once for all exclusively to one of the three departments. There are many powers which are of doubtful classification both analytically and historically. A classical example is rate-making which may be conceived of as a legislative or as an executive function with equal propriety. Another example is the making of rules of procedure for the courts which according to whether it is looked at historically or analytically might be regarded as a judicial or as a legislative function. Another example is the application of standards, which the common law committed to the jury but recent statutes so often commit to administrative agencies. Chief Justice Marshall pointed out the solution long ago. It is a proper legislative function to assign powers of doubtful classification to an appropriate department. There is no valid objection to rate-making, or application of standards, or making their own rules of procedure by administrative agencies. What lawyers do object to is the proposition that these agencies, alone of all the agencies of government, shall act without any substantial check, shall be free to ignore rights, to act in the teeth of evidence, or upon no real evidence, shall be free to keep the basis of their action concealed and cut off all opportunity for refuting or disputing it, and shall be at liberty to make rules of highly serious import with none of the checks which are imposed on legislative and judicial rule-making.

It is a highly gratuitous assumption, but one made frequently in lay discussions of this subject today, that administration, which has always been the mode of social control by an autocracy, must be the characteristic mode of social control by a democracy. Those who would set up anew the administrative absolutism of the later Roman empire, of the French monarchy of the ancient regime, and of the administrative tribunals of the Tudor and Stuart kings should be cautious about talking of turning back the clock. If a democracy cannot function without administrative absolutism it is fated to turn into an autocracy.

Marx's Doctrine of the Disappearance of Law

Where does this doctrine that we must give up all checks and balances, that we may ignore individual rights, that the separation of powers embodied in our constitutions must be discarded, and that due process of law is an out-moded phrase— where does all this doctrine come from? The impatience of legal limitations and tendency to use power arbitrarily and without hearing or fairly hearing both sides to which the doctrine gives aid and comfort are as old as government. In the last century our legal and political teaching sought to repress them. The teaching of today which encourages them comes in one way or another from Marx's theory of the disappearance of law. This doctrine has been very heartening to the autocracies. But it is urged by teachers in the English-speaking world. There are teachers in England who object to the way in which the English courts enforce the common-law doctrine of the supremacy of the law upon administrative agencies and urge that law belongs to the past and administration to the future, and this way of thinking has been growing in American institutions of learning. Marx substituted for the interpretation of history as the record of the unfolding or realizing of an idea of liberty an interpretation of history as the record of the unfolding or realizing of an idea of satisfying material human wants. These wants would be better and more fully satisfied when property was done away with. Rights and law to maintain them belonged to a society which maintained a regime of private property. Property and rights and law were to disappear together.

While on one side such thinking could lead to the philosophical anarchy which had many adherents in academic circles in the last decade of the nineteenth century, it has led in recent times to an exaltation of the political organization and in consequence of administration as the most complete manifestation of the power of that organization. Thus it is connected with the rise of absolutism all over the world. Received theories long affect practice, but established practices in the end shape theories. The Roman emperor, who in the original theory was the first citizen of a republic, upon whom in an emergency all the powers of all the magistrates had been conferred for life, was not sure for a long time that he was above the law. The statute by which the power of all the magistrates was conferred upon him seems to have only given him absolute discretionary authority in administrative matters. As the chief magistrate he was subject to the laws and bound to carry them out as the magistrates of the republic had been. But the emperor was expressly exempted from certain statutes, and could exempt himself from the operation of any particular statute. As might be expected, this resulted in time in regarding the emperor as *legibus solutus*—exempted from the laws—and in the doctrine that his will had the force of a statute. It is well to compare with this doctrine the one urged by some teachers of law both in this country and abroad, indeed for the time being a prevailing doctrine abroad, that law is whatever is done officially and laws are only threats of official action. If officials do not carry out some particular threat in some particular cause, it does not affect the law because law is the executing, not executing, or partially executing, the threats, not the body of threats themselves. What officials do is law because they do it is very like what the emperor wills is statute because he wills it.

Moreover, recently we have been seeing statutes giving the interpretation of them to the executive, or to administrative officials. It is true these statutes have

had for their purpose to leave it to the executive or administrative official to determine who is to be the recipient of federal bounty and so may be said to create no right in any one to be a recipient. But where the statute defines a class or type of persons who are to be recipients and after defining the class or type takes away interpretation by the courts, where it goes so far as not merely to leave it to the executive to designate the recipient but also to leave interpretation of the provisions and directions of the law to the executive, we certainly have definitely entered upon the path leading to a *lex regia*. Certainly we have been moving a long way from the pronouncement of Mr. Justice Miller that the genius of our institutions was opposed to the deposit of unlimited power anywhere.

As part of the absolutist political teaching of the time an idea, imported from Europe, has been argued for namely that a limited or constitutional democracy is a contradiction in terms. It is urged that democracy means absolute government by majorities or pluralities, and so by those chosen by majorities or pluralities to wield the powers of a politically organized society. It is urged that the idea which ruled in the beginning of our polity, the idea of a people covenanting that it would not do certain things and would only do certain other things in a certain way, is logically inadmissible. It is said that a people in which sovereignty resides cannot bind itself. It must in the nature of things be an absolute ruler. But granting that when a people comes to frame a constitution there are no limitations upon what it can do short of those imposed by physical nature, granting, as was said by the Supreme Court of the United States that "the power existing in any body politic," when framing a constitution, "is absolute despotism," that "in constituting a government the body politic distributes that power as it pleases and imposes what checks it pleases upon its public functionaries," it does not follow that it is precluded by the very nature of democratic government from imposing checks upon those functionaries and providing for balance of the agencies of government and separation of powers. Because the ultimate power of a people to choose such polity as it pleases and arrange the details of that polity as it pleases has no limit, it does not follow that limits may not be set to the powers reposed in public officials and checks may not be imposed upon the exercise of those powers. Our constitutional history for more than one hundred and fifty years shows that this can be done, if it needed any demonstration. But when it is done by a constitution which is the supreme law of the land, that supreme law is like any body of law, as distinguished from a mere rule attaching definite detailed consequences to a definite detailed state of facts. It is something to be developed and applied by the courts by the authoritative technique; and this developing of experience by reason and testing of reason by experience is not to be disposed of by calling it "legalism." It is not the least of the achievements of civilization.

Moreover, the argument that democracy must mean absolute rule of a majority does not stop there. It might be said in answer to the proposition that a democracy restrained by self-imposed constitutional limitations and guarantees is a contradiction in terms—it might be said in answer to this that it is not necessary to give an agent unlimited powers. Agency certainly admits of limitations. But the self-styled political realists of today tell us that a government is in reality nothing more or less than the aggregate of those who wield the powers of politically organized society, and hence that limiting them is limiting government which by hypothesis is above limitation. One cannot, in the fashion of these times, vouch history for institutions or doctrines. To do so, I suppose, is the looking "pastward" rather than forward which is interdicted in the veto message. We are not allowed to say, therefore, that these teachings imported from Continental Europe run counter to what had been the English conception since the Middle Ages and the Anglo-American conception since the seventeenth century. Yet though we cannot be heard to say this, we still may point out the logical fallacy in the argument which jumps from the theoretical powers of a people to the actual powers of those chosen by a people to conduct its political organization.

In a federally organized constitutional democracy, the only kind, I submit, which may rule a domain of continental extent, every one, every official as well as every private person, acts under and subject to the scrutiny of the law to see to it that he keeps within the limits of his authority or his liberty. No one is above the law. Whatever is done by any one is subject to be looked into in ordinary legal proceedings, conducted in the ordinary courts, by the ordinary procedure of the law of the land, whenever it injures or is claimed by some person to injure the latter's rights. This is the Anglo-American doctrine in which lawyers were brought up, which we are now being taught is outmoded, as the Archbishop of Canterbury told James I in 1612 it was outmoded in the form in which it had come down from the Middle Ages. The conference between James I and the Judges of England, as to whether the king could sit in person in the King's Bench and decide cases by his natural reason instead of leaving them to be decided by the judges according to "the artificial reason and judgment of the law" reads almost as it might if the conference were to take place today.

Public Law as "Subordinating Law"

Today we hear much of a new doctrine of "public law" which, so we are told, "is gradually eating up private law." The English teacher who writes this goes on to say that industrial law is being controlled by administrative organs and is at the same time eating into the law of obligations. Quotas and marketing schemes under administrative control reduce the operation of commercial law. Housing and planning law takes the law of property under public control. The public lawyer, he adds, is ousting the private lawyer and duties of institutions are superseding the ordinary rights and duties of private citizens. It will have been observed that he speaks of taking the law of property under public control, meaning that when administered by the courts it is under private control, in that individual rights are respected, whereas when committed to administrative agencies private rights are not respected. Note that this is supposed to be the purpose of administration, representing the public, as contrasted with courts representing private interests. Here we have the Marxian doctrine of disappearance of law over again, and it is significant that the message speaks in much this same vein.

What is meant by this doctrine of the superseding of private law by public law, a doctrine imported from Continental Europe, is brought out if, for example, we read Radbruch's philosophy of law. He tells us that "labor law and economic law," the latter meaning the administrative adjustment of relations involved in trade,

finance, banking, industry, transportation, public utilities, and the like, are "a penetration of public law into the domain of private law." By this he does not mean merely that such things have in the English-speaking world come more and more under the jurisdiction of administrative boards and agencies. On the Continent, administration has always had to do with a large domain in the legal order. He refers to an entire difference in spirit between what is called public law and the law of the land which is called private law, which he takes to be nothing less than opposition of the one to the other. Moreover, he holds that that opposition is necessary and to be taken into account in every connection in which we have to do with legal phenomena. What, then, is the distinction which involves this fundamental and necessary opposition between that part of the legal order having to do with securing individual rights and that part having to do with the action of administrative agencies and public officials?

We are told that we must start with a contrast between commutative justice, a correcting justice which gives back to one what has been taken away from him, or gives him a substantial substitute, and distributive justice, a distribution of the goods of existence, not equally but according to merit or a scheme of values. In the positive law this distinction, we are told, corresponds to a contrast between the "co-ordinating law" which secures interests by reparation and the like, treating all individuals as equal, and the "subordinating law" which prefers the interest of some to others according to its measure of values. Thus, to take an example from abroad, where the nineteenth-century law of torts as a rule imposed liability on the basis of culpability, treating interests of individuals as of equal value, the tendency in Continental Europe in the present century has been to give over the idea of culpability in favor of an idea of security in which the interests of those who suffer injury without fault of others are given a higher value. This is much the same idea as what Simon Patten used to call distribution of the economic surplus, and is not unknown in the verdicts of juries in accident cases. Public law, Radbruch continues, is a "law of subordination," subordinating individual to public interests and identifying some individual interests but not the interests of other individuals with those public interests. We see now why judicial insistence on due process of law, on the administrative agency hearing both sides, proceeding on the basis of evidence of rational probative force, and keeping within the statutory limits of its powers, is so distasteful to those who preach the gospel of full administrative freedom. Due process of law involves a treatment of individuals as equals, having constitutionally secured rights. But that is the co-ordinating law of the courts. The administrative tribunals are dispensing subordinating law which enables them to put a higher value on one side than on the other and so authorizes them to ignore the other or give it a merely formal hearing.

Radbruch considers the opposition between public law as a subordinating law and private law as a co-ordinating law something given *a priori* and inevitable for any body of law, so that our common-law attempt from the Middle Ages to the twentieth century to reduce the whole law to private law, and the attempt of our constitutions to fix a co-ordinating law as the supreme law of the land, have been a futile kicking against the pricks. Certainly Bacon and Archbishop Bancroft and James I and Charles I would have agreed with him. Also a generation of English and American writers on administrative law as a subordinating law and a brand of skeptical realists, who carry over the ideas of so-called administrative law into private law, may yet give Bacon the last laugh over Coke. But it will involve a laugh over the constitutional government which Americans built upon Coke's Second Institute.

The Basis of the Separation of Powers in Experience

We hear frequently today that the separation of powers was nothing but a fashion of eighteenth-century political thinking. Aristotle propounded it and Montesquieu mistakenly thought he saw it in the English polity of his time. It was in the air in the political thinking of the time when our first constitutions were adopted and so entered into them as a matter of course. Nothing could be more mistaken. It was not a mere fashion of political thought which gave us written constitutions or frames of government, which declared them to be the supreme law of the land (using the language of Coke's Second Institute) which included bills of rights and laid down a separation of powers, from the very beginning of our independence. All the states, except New Hampshire and Rhode Island, had such constitutions within four years of the Declaration of Independence, and New Hampshire had such a draft within that time. The separation of powers stands out in all of them. It is much more insisted upon than the details of the political organization. Often the latter were left much as they were or were committed to legislation. We must remember the experience that led up to this.

Already the Puritan Revolution had produced a written frame of government and important projects for a written constitution reflecting experience of absolute government and high-handed administration under the Tudors and Stuarts. But if the seventeenth-century colonists came to the new world with some such ideas, the eighteenth-century colonists had good cause to develop faith in them. In the polity which obtained down to the Revolution the ultimate control of each province or colony was in the Privy Council at Westminster. It had ultimate control of legislation, having power to disallow all provincial acts, and kept Pennsylvania twenty-one years without a court organization because no statute organizing the courts of the province could be framed to suit the ideas of the Council. It had the ultimate executive power in each province, exercised through instructions to the royal governor. It had the ultimate judicial power in each province and one of the chief causes of disallowing colonial or provincial statutes was the attempt by legislation to limit appeals to the Privy Council in point of amount involved in the cause and as to the time of taking them. All judgments of any consequence were reviewable by this body of laymen, seldom advised by the law officers of the Crown and often acting quite after the fashion of administrative agencies exercising quasi judicial functions. Again in each province there was a like concentration of power in the Governor and Council. The Crown named the governor and the latter often named the council. This body was often the upper house of the legislature, subject to the scrutiny of its acts by the Privy Council. It had complete control of administration, again subject to the scrutiny of the Privy Council which called for reports from the governor and issued instructions to him. It was often the highest court of appeal in the province and its judgments and those of any other

body set up as the highest court, were subject to appeal to Westminster. Sometimes the provincial legislature exercised undistributed powers with no limitation beyond veto of laws or a reversal of judgments by the Privy Council. It granted continuances in particular cases, granted particular litigants exemption from particular provisions of the statute of limitations, granted probate of particular wills rejected by the courts, directed details of administration of particular estates, foreclosed particular liens by legislative acts, and enacted title out of one party and into another by what amounted to a legislative ejectment. In short, it gave the colonists first hand experience of a subordinating justice and a body wielding all the powers of politically organized society. It is no wonder that two years before the Declaration of Independence, the Declaration of Rights of the Continental Congress claimed as against omnicompetent legislatures and councils and administrative bodies with unlimited powers, the immemorial common-law rights of Englishmen, as declared by Coke and by Blackstone, as being their birthright. But these common-law rights of Englishmen as laid down by Coke were formulated in the struggle between the courts and the Crown in which the courts succeeded in imposing legal checks upon the action of administrative tribunals and in establishing the supremacy of the law. I repeat, it was not a mere fashion of political thinking. It was experience of absolute government in which all of the powers of politically organized government were united in the Privy Council or a royal governor and council, or a provincial legislature, which led the colonists to turn to Coke's Second Institute and later to Blackstone, to assert the common-law rights of Englishmen as their birthright, and afterwards to guarantee them in all of the first American constitutions.

The Rise of Administrative Absolutism

In any discussion of administrative absolutism and its relation to the revival of absolutism throughout the world and advent of an era of absolute governments recalling the seventeenth and eighteenth centuries, one encounters the bogie constantly raised by advocates of administrative lawlessness, that all efficient administration is threatened, that there is a movement to destroy administrative agencies, and that those who stand for our constitutional polity and due process of law seek a return to a regime of laissez faire. There is no question that in the last century we did seek to tie down administration, such as there was then, excessively. But that was a phase of a general tendency of nineteenth-century law throughout the world, and of a tendency in every form of activity at that time. In law we sought to reduce everything to hard and fast rule on the analogy of rules of property. In the different branches of learning we sought to set off an exclusive field for each, analytically defined, and to subdivide it in an analytical classification putting everything in its exact place. With respect to administration, reaction from this began as far back as 1880, and the judiciary in the present century has been quite willing to allow ample scope for administration within the limits fixed by statutes and with proper regard for due process of law. The tendencies of administrative justice to which the profession objects became manifest specially under the regime of national prohibition. Those who were in charge of administration of the National Prohibition Act felt strongly that the objects of that Act were of such paramount importance as to justify extra-legal measures and overriding of individual rights and constitutional guarantees—in short, a subordinating law. Down to the National Prohibition Act there was little complaint of arbitrary administrative action. The pioneer federal administrative agency had its beginning under the guidance of a great common-law judge, the author of a classical text on constitutional limitations. Since prohibition the zeal of those who exercised administrative powers under the statute has infected those charged with carrying out other laws which they no doubt feel of paramount importance, justifying the means by the end. This feeling has been furthered by the doctrine of disappearance of law and its corollaries, by ideas of so called legal realism, and by the spread of institutionalism and totalitarianism and kindred teachings in political theory. All these things have worked with the natural tendency of those entrusted with wide powers with no traditional technique of using them to exercise them even beyond the appointed limits. Zeal to carry out certain purposes may blind those who see only those purposes to other matters of which the law must take account.

In the veto message a higher value is put upon an ounce of action than upon a pound of argument. But much depends upon the nature of the action. All law is a restraint upon action. Restraining arbitrary action need not hamper a body engaged in well considered action according to law. If administration cannot be carried on within constitutional and legal limits and in accord with due process of law, we may as well give up all pretence of being a constitutional democracy and set up an avowed dictatorship. For the only power which can hold down the proposed fourth department in which all the powers of government are to be reposed will be a superman head of the administrative hierarchy with the ultimate absolute power in himself.

According to the veto message the judiciary is to be confined to "co-ordinating law" in the continually narrowing field in which courts are to be permitted to recognize rights and treat individuals as equals. They may still try automobile accidents, though these are not unlikely soon to be committed to bureaus and boards, and ordinary debts as between persons still allowed to be on the same plane, and ordinary trespasses committed by those to whom a higher merit has not been attributed by public law. But the weightier matters of the law are too high for the courts. They must be left to the free hand of administrative officials subject only to the control of the supreme executive.

Today the judges of the land are much in the position of the common-law judges under the Stuarts and the judges who enforced the separation of powers upon legislatures in the era immediately after the Revolution. Then, too, for a time there were those who preferred "an ounce of action" to the weightiest considerations of how it was done. The judges of today have the same duty which the judges had then. No matter how chosen or by whom, the common-law judges have on the whole stood up successfully for the law of the land. Nothing less than the law of the land, under our constitutional polity determines the cases appropriate for exercise of the judicial function. To cut off from the province of the judiciary all scrutiny of official action infringing individual rights would do away with the most characteristic of American institutions, the one outstanding American contribution to politics, the constitutional democracy under which all the powers of politically organized society are exercised by officials and agencies subject to the law of the land.

ANALYSIS OF BILLS ACCOMPANYING REPORT OF THE ATTORNEY-GENERAL'S COMMITTEE

Pending Bills

THE bill prepared and recommended by the majority of The Attorney General's Committee on Administrative Procedure is S. 675. The more comprehensive bill to give effect to the recommendations of Messrs. Carl McFarland, E. Blythe Stason, and Arthur T. Vanderbilt, of that Committee, is S. 674. Chief Justice Groner, whose "separate statement" is printed in this issue, did not submit a definitive bill; and none has yet been introduced as embodying his views. The Walter-Logan bill, vetoed by The President in December, will be re-introduced. The pending bills are before the Senate Committee on the Judiciary, which has created a sub-committee consisting of Senators Hatch of New Mexico, as Chairman, O'Mahoney of Wyoming, Chandler of Kentucky, Austin of Vermont, and Danaher of Connecticut. This sub-committee will soon hold hearings upon all proposals for legislation as to administrative law and procedure.

Association Should Continue to Help

It is expected that, as heretofore, the American Bar Association will take part in these hearings, and will render such assistance as it can to the enactment of suitable and adequate legislation.

Importance of Open-minded and Cooperative Action

Lawyers generally will enter upon their examination of these bills with a keen realization that, as stated by Mr. Justice Brandeis in *Burdeau v. McDowell* (256 U. S. 465, 477), "in the development of our liberty insistence upon procedural regularity has been a large factor." Belief in fair play and insistence upon what Mr. Justice Cardozo called "the rudiments of fair play" in the procedure and practices of the administrative agencies, are instinctive in the American ideal of impartial, law-governed justice; and in view of the conditions now conceded to call for prompt remedy, the pending bills will and should be scrutinized from the point of view of their adequacy and their fidelity to the American tradition. The purpose, as stated by The President in his message of December 18th (H. Doc. No. 986; 76th Cong. 3rd Session, page 4)—

> "is not to hamper administrative tribunals, but to suggest improvements, to make the process more workable and more just, and to avoid confusions, and uncertainties and litigations."

In such a task, there need and should be no pride of source or authorship, but only an open-minded willingness to face the realities and the practicalities, and to submerge personal views, if need be, in working out a consensus of opinion in behalf of acceptable solutions.

Notable Public Service Rendered by Whole Committee

Before any atmosphere of controversy between divergent views develops, it is appropriate to point out several considerations which ought never to be obscured. The Committee and its staff have done monumental work through its two-year study; the Committee actually came to a gratifying measure of agreement upon essentials, both in making clear the conditions which call for remedy and in developing the legislative approach. The Committee members have set down their respective views in public documents which speak for themselves. From now on, the tasks of appraisal and advocacy fairly devolve upon others.

The report and bills as submitted reveal wholesome differences of opinion, ranging from the "majority" recommendations to the trenchant views of Chief Justice Groner, with "middle ground" taken by Messrs. McFarland, Stason, and Vanderbilt. In part, these differences of opinion are as to methods, rather than as to objectives; in part, they appear to be fundamental and far-reaching. The task remains for the Congress to accept the points of agreement, resolve the differences as to the scope of needed legislation, and perfect an adequate bill. Thanks to the prodigious labors of the whole Committee and the Association's Committee on Administrative Law, the material is fully at hand for such a fulfillment.

Inappropriateness of Terms "Majority" and "Minority" Reports

An understandable tendency is already manifest to refer to the Committee report and bill (S. 675) as the "majority" action and to denominate as a "minority report" the additional views, recommendations and bill (S. 674) of Messrs. McFarland, Stason, and Vanderbilt, with Chief Justice Groner concurring but going further as to separation of the functions. Probably for convenience this terminology will and should be continued, as it seems appropriate for some of the divergencies.

If this is done, it should nevertheless be borne in mind that the so-called "minority" have presented what is not so much a "dissent" in the true sense as a submission of additional views, considerations and recommendations for legislation, based on essentially the same factual showing of administrative procedures and practices. At least some members of the "minority" believe confidently that if the Committee had been permitted another month or so to continue its deliberations, the accord would have been at least much more nearly complete. Faced with a great deal of demand for a report early in January, the Committee had to end its deliberations, with the result that "minority" members stated separately various considerations and legislative proposals which otherwise they would have urged insistently in the Committee, with hopes for acceptance in large part. So now the working out of a sound and helpful result rests with the Congress, with the aid of the lawyers as a part of the public.

Analysis of Bills

Using the terms "majority" and "minority" only for brevity, this article will point out some of the salient differences between the two bills, with some references to the Walter-Logan bill. Obviously, no complete or sufficient analysis and exposition could be made within the available space. Probably the most complete commentary as yet available will be found in the *notes* which annotate the "minority" bill as appended to the "additional views" of Messrs. McFarland, Stason and Vanderbilt.

Differences between the "majority" (S. 675) and

"minority" (S. 674) bills are denoted by their titles. S. 675 is "A Bill to revise the administrative procedure of Federal agencies; to establish the Office of Federal Administrative Procedure; to provide for hearing commissioners; to authorize declaratory rulings by administrative agencies; and for other purposes." S. 674 is "A Bill to prescribe fair standards of duty and procedure of administrative officers and agencies, to establish an administrative code, and for other purposes." Each bill employs (Section 1) the useful device of a legislative "declaration of general policy," but it has been pointed out that the declaration in S. 675 does not specifically include the protection of statutory, as distinguished from constitutional, rights, and does not include the safeguarding of benefits as well as the imposition of restrictions and penalties.

Particular Features Compared

I. Creation of the Office of Federal Administrative Procedure

Both bills are happily agreed on the creation and the make-up of an Office of Federal Administrative Procedure (O F A P), somewhat analogous to the Administrative Office of the United States Courts, which was established with the hearty support of the American Bar Association. The Walter-Logan bill contained no such proposal. The Office is to be made up of (1) a Director of Federal Administrative Procedure, appointed by The President by and with the advice of the Senate, for a seven-year term at $10,000 a year (the "minority" bill specifying that the Director shall be "learned in the law or qualified by experience"); (2) one of the Associate Justices of the Court of Appeals for the District of Columbia, designated by its Chief Justice; and (3) the Director of the Administrative Office of the United States Courts, who is appointed by the Supreme Court.

To this independent board, as far removed as practicable from political considerations and control, the respective bills would entrust varying degrees of supervision of the agencies and their procedure, the minority bill (S. 674) being much more thorough-going and specific. In several highly important respects, the "majority" bill (S. 675) places pivotal powers of appointments, etc., in the Director alone rather than in the three officials constituting the Office. The "minority" submits that "to provide for the control or supervision of all administrative hearing officers and procedures, in every agency of the Federal Government including independent commissions, by a single, political official of limited tenure seems obviously unwise." The "majority" bill seems even to leave it to the Director to decide what agencies shall be subject to the Act. Its proposed Section 106(1) provides that "The Director shall designate from time to time, as occasion requires, the administrative establishments of the United States which are agencies within the meaning of this Act."

II. Independent Hearing Commissioners and the Limitation of the Agencies to Use of Such Hearing Commissioners

Both bills propose to substitute hearing commissioners for the present trial examiners; the bills differ in the degree of independence and security of tenure given to such triers of the facts, and in the safeguards erected to assure that the agencies could not circumvent the plan of untrammeled hearing officers, at least in cases where the agency wished to assure particular findings and results. The Attorney General has pointed out that "it may well be questioned whether an agency head who is so arbitrary as to need curbing will name so fair and courageous a group of subordinates as will apply the needed curb."

Both bills provide for the appointment of hearing commissioners for each agency upon nomination by the agency. Nominations and appointments are to be made "on the basis of merit and efficiency alone," with "no political test or qualification" permitted or given consideration. The "majority" bill vests the power of appointment in the *Director;* the minority bill vests it in the three men constituting the *Office,* after "consideration and approval of the training, experience, character and temperament of such nominees" to discharge their particular duties. The "majority" bill gives a seven-year term which is less than the present term of trial examiners; the "minority" provides a twelve-year term. The "majority" bill continues for each agency a chief hearing commissioner; the "minority" fears that such an officer may continue to be the instrument for agency control and discipline over the independence and control of hearing commissioners.

The "majority" bill (Section 302(7)) authorizes "provisional" appointments *by the agency* for not more than one year, which might enable an agency to test out the amenability of a hearing commissioner before nominating him for a full appointment. The "majority" bill (Section 302(8)) authorizes also, with the aproval of the Director (not the Office), a "temporary" appointment "for the purpose of hearing a particular case," under indicated circumstances, which have been questioned as affording the agency an escape from the whole independent hearing commissioner system, at least in the cases which need it most. Section 302(6)(a) of the "majority" bill provides for the suspension of hearing commissioners *by the agency,* without salary, and for their removal after hearing before the Director and two other persons designated by the Office. This has been objected to as leaving the hearing commissioners faced always with the possibility that they may be suspended from office, without pay, for long periods, pending the uncertain outcome of removal proceedings. The hearing commissioner system is suspended under Section 303(2) of the "majority" bill where the facts are agreed, which deprives parties of the independent judgment of hearing commissioners in such cases, and deprives them of the benefit of a hearing commissioner's decision upon which arguments before the agency may be made.

The "minority" bill (S. 674) contains provisions intended to prevent agencies from evading or by-passing the independent commissioner system.

III. Separation of Administrative and Prosecuting Functions from Quasi-Judicial Functions

Except in the respects already indicated, the "majority" bill (S. 675) does not go far in accomplishing a separation of functions. The "minority" bill goes further, but tries to keep within the limits of what Messrs. McFarland, Stason and Vanderbilt deem to be practicable, without risking impairment of the effective functioning of the agencies. In the absence of a more thorough-going separation, the "minority" urge the statutory authorization of a broader judicial review, as an essential safeguard. The two bills should be examined for the details of their proposals as to the separation of powers.

Although agreeing generally with the others of the

"minority," Chief Justice Groner's "separate statement" challenges both bills as not going nearly far enough in accomplishing a present separation.

IV. Scope of Judicial Review

The "majority" bill (S. 675) would not broaden substantially by statute the scope of judicial review of agency decisions. The "minority" bill (Section 311(e)) would authorize judicial review of all relevant questions of (1) constitutional right, power, privilege or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness and adequacy of procedure; (4) findings, inferences or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious.

V. Code of Fair Standards of Duty and Procedure of Administrative Officers and Agencies

The "minority" propose and strongly urge such a code of ethics and fair play, by legislative authority, for the members, staff, hearing commissioners, etc., of the agencies. The "majority" submit no such code for enactment, and express earnest doubt whether many of the matters contained in the "minority" standards are advisable subjects for legislation at all.

Contained in the "minority" code are many provisions which should be examined as of special interest and importance to lawyers, as affecting their standing and rights, and those of their clients, before the administrative agencies.

VI. Other Significant Provisions and Omissions

As to the "majority" bill (S. 675), it has been pointed out that

(1) Its delegation of authority (Section 3) is not limited by (a) a requirement for publicity of all delegations, and (b) a provision that delegations shall not operate so that hearings are held before a subordinate officer with review or revision before a superior officer without hearings or argument.

(2) All types of rule-making are not listed and identified in Section 201 of the "majority" bill.

(3) Its Section 301, regarding the application of the adjudication title, (a) accords no right to a hearing, but merely applies where the law already requires a hearing, and even then only where decision is by law required to be made "upon the basis of a record made in the course of such hearing" (which leaves open the vexed question whether administrative agencies are ever confined to the record); (b) does not apply to hearings held before the highest authority of the agency or before a member of its board, or an officer of one of the states; (c) does not exempt from formal administrative adjudications those matters which are subject to trial de novo; and (d) does not provide for the conferring of necessary powers upon, or the giving of necessary directions to, exempted agencies or processes.

(4) Section 304(4) of the "majority" bill places the burden upon the parties to request opinions of hearing commissioners.

(5) Title IV, respecting declaratory rulings, leaves it to the discretion of the agency whether it will issue such rulings.

The following further items have been noted as to the "majority" bill in comparison with the "minority" bill:

(a) There is no direction for decentralization of authority. See Minority bill, Sec. 103(c).

(b) There is no statement of right of parties to appear. See Minority bill, Sec. 104.

(c) There is no statement respecting admissions of attorneys or others to practice. See Minority bill, Sec. 105.

(d) There is no treatment of the problem of investigatory powers. See Minority bill, Sec. 106.

(e) There is no statement of a rule regarding the issuance of administrative subpoenas. See Minority bill, Sec. 107.

(f) There is no statement requiring equality of treatment in matters of publicity or the limitation of publicity in confidential situations. See Minority bill, Sec. 108.

(g) There is no clear vesting of the authority over hearing commissioners and procedures in a governing board of non-political officers. See Minority bill, Sec. 109(a).

(h) There is no provision for disciplinary action for wilful disregard of the statute. See Minority bill, Sec. 110.

(i) There is no provision for suspension of provisions in case of unforeseen difficulty. See Minority bill, Sec. 111.

(j) There is no declaration of policy respecting rule-making. See Minority bill, Sec. 200.

(k) There is no prohibition of secret rules. See Minority bill, Sec. 203.

(l) There is no provision requiring the rescission of withdrawn invalid rules. See Minority bill, Sec. 204.

(m) There is no provision requiring non-public investigation prior to rule-making. See Minority bill, Sec. 206.

(n) There is no provision specifying the nature of notice to be given in connection with rule-making. See Minority bill, Sec. 208.

(o) There is no enumeration of types of rule-making procedure. See Minority bill, Sec. 209.

(p) There is no recognition of judicial review of rules. See Minority bill, Sec. 211.

(q) There is no requirement that rulings, as distinguished from rules, shall be published and shall not be utilized as substitutes for formal rules. See Minority bill, Sec. 212.

(r) As to administrative adjudications, there is no provision for expedition of the process. See Minority bill, Sec. 302.

(s) There is no express provision authorizing informal procedures upon consent of the parties. See Minority bill, Sec. 303.

(t) There is no requirement of adequate notice or any other type of notice. See Minority bill, Sec. 305.

(u) There is no provision permitting private parties to have access to the record. See Minority bill, Sec. 306.

(v) There is no provision regarding answers or responsive pleadings. See Minority bill, Sec. 307.

(w) There is no definition of the areas in which formal procedures shall be available. See Minority bill, Sec. 308.

(x) There is no provision for the internal segregation of prosecuting and deciding functions. See Minority bill, Sec. 309(a).

(y) There is no provision that the functions of presiding officers shall be judicial in nature and subject to the canons of judicial ethics. See Minority bill, Sec. 309(b).

(z) There is no provision for reappointments of hearing commissioners except with the approval of agencies. See Minority bill, Sec. 309(c) (1).

(aa) There is no requirement for the application of the principles of evidence. See Minority bill, Sec. 309(h).

(bb) There is no provision respecting cross-examination, written evidence, depositions, or stipulations. See Minority bill, Sec. 309(i).

(cc) There is no limitation upon the scope of official notice. See Minority bill, Sec. 309(j).

(dd) There is no provision requiring that decision be confined to the record. See Minority bill, Sec. 309(m) (4).

(ee) There is no provision that deciding officers shall personally master those portions of the record relied upon by the parties. See Minority bill, Sec. 309(m)(4).

(ff) There is no limitation regarding sanctions and no expression regarding the grant of benefits. See Minority bill, Sec. 310.

(gg) There is no provision regarding the availability and scope of judicial review. See Minority bill Sec. 311.

The foregoing details of analysis may be helpful in determining what should be included in, and what should be excluded from, an adequate and acceptable bill. It is to be hoped for that such a bill can soon be agreed upon, accepted, and urged, by all concerned.

SUMMARY OF ATTORNEY GENERAL'S COMMITTEE REPORT BY DEAN ACHESON, CHAIRMAN

Note: The following summary of its voluminous report was prepared for release to the press by Chairman Acheson for the Committee. Repetition of names, etc., has been deleted.—Ed.

Purpose and Methods

The President's instructions to the Committee were to make a thorough study of existing administrative practices and procedures "with a view to detecting any existing deficiencies and pointing the way to improvements." Administrative procedures are the methods which have been devised for carrying out the duties which Congress has assigned to these agencies. The Committee has not undertaken to pass upon the wisdom or efficacy of the legislation administered by the Federal agencies, the propriety of their regulations, or the correctness of their decisions. Its field of inquiry has been limited to their procedures and procedural practices.

27 Monographs

The Committee decided at the outset of its work that thorough understanding of the actual practices and procedures of the agencies was essential both to fair criticism and to intelligent recommendations for improvement. Under its direction, therefore, the Committee's staff prepared a series of 27 monographs on the existing procedures and practices of those Federal agencies which chiefly affect private interests. These were widely published, and in June and July, 1940, the Committee held hearings at which its obtained the comments and opinion of the public and the Bar. Upon the basis of this material the Committee's recommendations are laid.

Variety of Agency Functions

The Committee found that no single fact is more striking in a review of existing Federal administrative agencies than the variety of duties which are entrusted to them to perform. This central fact makes generalization in description difficult. It makes even more difficult generalization in prescription. But the Committee has regarded these difficulties not as a barrier but a warning. It has become convinced that there should be general improvement in administrative procedure at the stage of formal hearing and decision. Accordingly, its recommendations, both in its report and its bill, include major proposals for generalized action at this stage. In considering either the present proposals or suggestions which may grow out of future study, however, awareness of the difficulties of generalization remains important, and persistent testing in specific applications is imperative.

Administrative Process Not New

The administrative process is not new. Administrative agencies were utilized by colonial legislatures and the first session of the first Congress enacted three statutes conferring administrative powers, which are antecedents of statutes still administered by two existing agencies. Of the approximately 50 existing agencies or subdivisions discussed by the Committee, 11 trace their beginnings to a period prior to the close of the Civil War and only 17 to the period from 1930 to 1940. Where Congress has chosen administrative instead of purely executive action, the administrative process is not an encroachment upon the rule of law, but is an extension of it. From the beginning, the administrative process has been utilized to limit discretion, to effectuate social legislalation, to provide for continuity of attention and clearly allocated responsibility, or to provide for action which because of practical or legal limitations, neither the courts nor Congress could themselves handle.

Need for Delegation by Agency Head

A necessary characteristic of administrative procedure and organization is delegation. The agency heads cannot do everything; and, when they try to do a little of everything, the important tasks of direction and supervision, of final decision of cases, and establishment of guiding principles suffer.

Internal Management

The agencies differ in the degree to which they have faced and mastered the problem of organization to sift out and dispose of the matters which do not need the personal decision of the chiefs. The following recommendations, embodied in the Committee's bill, are all in effect in some agencies. They are necessary to give the citizen a chance to deal with an official who has authority to act and to give the heads of the agency the time to decide fairly and wisely important matters affecting public interest and private right.

Matters of personnel and internal management should be entrusted to an executive officer responsible to a single member or small committee of the agency chiefs.

Routine applications, such as for extension of time or waivers of formal requirements, should also be delegated to responsible officials similarly supervised.

Needful Powers and Authority

Authority should be given to responsible officials to dispose of matters if agreement is possible, or to institute formal proceedings if it is not, under controls which provide for (a) the statement by the chiefs of the principles which the officials shall follow,

(b) the reference of all novel or doubtful questions to the chiefs, and (c) submission of summarized statements of action taken by subordinate officials so that the chiefs may inquire into any matter as to which they may have doubts.

The special officers recommended below should be created, where the agency heads do not themselves hear the testimony in formal cases, to hear the evidence and make the initial decision subject to appeal and review by the chiefs.

Need for Public Information

An important defect in the field of administrative law is the lack of adequate public information concerning its substance and procedure. Where an agency does not publish its rules or inform the public concerning its policies or procedures, public suspicion is engendered and the belief arises that the agency acts according to its whims. The Committee recommends in its report and proposes in its bill, therefore, that agencies publish their policies, their internal structure and organization, and the procedures available in order that persons dealing with an agency can know what the law is, and where to go, whom to see and what to do. Except in unusual circumstances, agencies should explain their decisions by writing reasoned opinions. And to achieve a measure of certainty and protection to individuals in advance of litigation, the Committee recommends that agencies be authorized by statute to issue declaratory judgments, binding on the agencies and the parties, and subject to judicial review.

Importance of Informal Procedures

Probably over 90% of the matters coming before administrative agencies are disposed of informally with the acquiescence of the private interest affected and without formal trial proceedings. This must be so or government could not function. There cannot be a trial to close every tax return, or to pay every social security or veteran's claim or to grant every license. The same is true in more controversial matters. In the first four years of its existence the National Labor Relations Board closed 12,227 cases in only 8% of which was it necessary to go to formal proceedings.

Informal procedures are vitally important to the citizen. Some improvements are desirable. For, although formal proceedings are usually available to a dissatisfied party, they are often impractical for him; and in those cases the true safeguard lies in improving the informal procedure.

Decisions Based on Inspection, Etc.

Where the decision is based on an inspection or test, as in grading grain or perishable products, or inspecting locomotives, ships, or airplanes, or passing on the skill of an airplane pilot, seaman, or truck driver, the inspector should be carefully chosen, his work constantly checked by his superiors, and a right to re-examination or reinspection by another and more experienced inspector should be provided where feasible.

Formal Proceedings Sometimes Harmful

Where the mere institution of formal proceedings may be fatal to the private interest, as, for instance, in the issuance of stop orders by the Securities and Exchange Commission, holding up the registration of securities to be offered for sale, the agencies have developed informal procedures by which questions can be threshed out in advance, objections avoided, and formal proceedings made unnecessary. These can be developed further in the direction of having available a member of the commission with authority to speak for it, or refer questions to it at once, and thus save precious time.

Cease and Desist Proceedings

The Committee recommends that agencies which bring proceedings for the discontinuance of practices prohibited by law employ the informal methods used by the Federal Trade Commission and the National Labor Relations Board to obtain in appropriate cases discontinuance by agreement without issuing complaints. It recommends also that, even after complaints have been issued, consent orders to assure future compliance with the law may be justified without insistence that the respondent admit past conduct which amounts to a violation of the law. These are cases where the border line between legal and illegal conduct is shadowy and is affected by the purpose or effect of the conduct. A party is often willing to define clearly what shall not be done in the future, while denying that precisely those acts have been done in the past.

Formal Trials

Formal trial with sworn witnesses, a stenographic record, briefs, and findings, occurs in cases, few in relation to the total volume, where informal methods have failed or are unsuitable to produce a satisfactory adjustment of the controversy. They have, however, an importance out of proportion to their numbers, because positions are strongly held, and the issues involved are often difficult and novel. As a result, it is of particular importance, not only to assure impartiality in decision, but public confidence in that impartiality.

Hearings

In very few agencies can the head of the agency or a member of the board or commission hear the testimony and make the initial decision. This is done by an official usually called an examiner. The Committee has observed that where the importance of these officials is recognized in the salary paid, the authority and independence of judgment accorded, and in the weight given to their decision, able men are attracted, the proceedings are well conducted and have the respect and confidence of the public. Where this is not so, the proceedings deteriorate, the entrance of anonymous reviewers to winnow out the essentials of the case makes for loss of confidence and suspicion as to the real seat of decision.

"Hearing Commissioners"

The Committee accordingly recommends that to every agency in which the heads do not themselves hear the cases, officials called hearing commissioners be added. They should be men of ability, stature, and prestige, should be appointed for definite terms of seven years, and should be paid substantial salaries fixed by law. They should constitute a separate unit in the agency's organization, not subordinate to anyone, but having the relationship to the head of the agency that judges of lower courts have to the appellate judges who review their decisions. They should have no functions other than those of presiding at hearings or prehearing negotiations and of initially deciding cases that fall within the agency's jurisdiction. They should be nominated by the agency heads, but should be approved and appointed by the Office of Federal Administrative Procedure, the creation of which is also recommended—composed of a Director, appointed by the President with the advice and consent of the Senate, a Justice of the United States Court of Appeals for the District of Columbia, designated by its Chief Justice, and the Director of the Administrative Office for the United States Courts, who is appointed by the Supreme Court of the United States.

Findings of Commissioners

The findings and decision of the hearing commissioner should become that of the agency unless within a specified time appeal is taken by a party or review ordered by the agency heads on their own motion.

Review by Agency Heads

Review by the agency heads should be limited to specific grounds set out

by the party seeking it, or in the order of the agency heads directing it, and there should be no obligation upon the agency heads to examine portions of the record not cited in support of allegations of error. Conclusions and interpretations of law should of course, be open to full review; but the agency heads should be reluctant to disturb findings of fact by a hearing commissioner unless convinced that they were contrary to the weight of the evidence.

Separation of Functions

This procedure, which the Committee has embodied in its bill, should result in the elimination of review staffs. Where agencies are headed by a board or commission, argument on appeal should be made before, and the decision should be made by, the heads themselves, sitting in divisions if necessary. They may be aided by assistants, but these should be true assistants and not substitutes. In single-headed departments or agencies, the Committee recommends that all pretense of consideration of each case by the agency head be abandoned, and that there be created boards of review or chief deciding officers who would exercise the final power of decision, subject only to review by the agency head when he should grant an appeal at his own discretion. And when he does so, the Committee believes he must be required to assume the burden of personal decision.

The Committee agrees, of course, that the same person should not be both prosecutor and judge. It believes that the recommendations made above preclude that situation. Under these recommendations the function of investigation and presentment will be in officials especially charged with this task, and the function of hearing and deciding, subject to appeal and review, will be in hearing commissioners carefully chosen and separated from all other functions. A study of the organization and procedures of such agencies as the Interstate Commerce Commission convinces the Committee that by separation of function within the agency impartiality of decision and public confidence in that impartiality can be achieved, and that to confer authority to hear and decide cases upon another and separate agency would seriously hamper administrative effectiveness without compensating advantages.

"Prosecuting" Agency vs. "Deciding" Agency

The Committee has considered carefully the possibility of separating the functions of an agency entirely by creating a "prosecuting" agency and a "deciding" agency. But it does not believe the method is adaptable to matters of regulation with which most administrative agencies are concerned. In such cases the protection of private interests lies in the impartial ascertainment of the facts, for which the Committee's recommendations provide. It is not furthered, and effective administration is hampered, by dividing between two agencies the interpretation of the law and the exercise of judgment, subject to court review.

Court Review

Court review of administrative decisions is at present available by statutory proceedings or by suits at law or in equity in substantially all cases involving private right. Where the case involves a matter with which by constitutional doctrine Congress is free to deal as it sees fit, such as the conditions under which one may contract with the Government or obtain a grant of money, among others, there may be no right to court review, although Congress often provides for it. For the most part, the courts themselves determine who is entitled to review and what may be reviewed. The Committee believes that the judicial review which now exists is wise and should be maintained. Changes in the limitations which have developed should be made by Congress or the courts only for specific situations and upon re-appraisal of the particular interests involved; the Committee believes that they may not wisely be effected by general legislation.

Function of Judicial Review

The proper function of judicial review is to confine administrative action to the fair exercise of legally conferred authority, not to substitute judicial for administrative decision. The judicial inquiry should, broadly speaking, be limited to whether the agency acted within the scope of its authority, whether the procedure was fair and whether the decision was based upon substantial evidence. The courts have the final word on statutory and constitutional interpretations; they require that a fair hearing be given; and they check arbitrariness or incompetence by their requirement that substantial evidence of record support the administrative findings of fact. The Committee does not believe that general legislation broadening the scope of this review is either wise or feasible. Reviewing courts do not and cannot insure "right" decisions; the best assurance of fair and correct determinations lies in the recommended improvement in the earlier phases of administrative procedure and in a wise choice of administrative personnel. Any attempt to transfer indiscriminately to the courts the burden of passing independently upon all the matters adjudicated by administrative agencies would break down the judicial machinery and deprive the administrative process of all utility.

Mistaken Review

Unnecessary difficulties exist, however, where there is doubt as to the proper court or method of review. Accordingly, the Committee recommends and proposes in its bill that if a wrong method of review is sought, or if the action is brought in the wrong court, the court shall, if it has jurisdiction, grant review as if the proper method were chosen, and, if only another court has jurisdiction, the case shall not be dismissed but shall be transferred to the proper court.

Administrative Rules and Regulations

Administrative rule-making under Congressional authority has been familiar since the beginning of the Federal Government. As Congress has dealt with more complex matters it has relied increasingly on the administrative branch to supplement broad principles established by statute with subsidiary rules made in the light of investigation and experience.

Rule-making Should Be Encouraged

Regulations are to be encouraged, not discouraged. The citizen wants to know what the rules are which the administrator is following. In some cases it makes little difference what the rule is—within the limits of the statute—so long as it is known. In other cases, it is of utmost importance that those affected by the rule be given a chance to express their views. Sometimes private persons express opposing interests. Sometimes the public agency has to safeguard the interest of those who are disorganized and inarticulate.

Rule-making Per Se

Administrative agencies have developed three aids to rule-making which are used singly or together: investigation by its own staff; informal discussion with outside interests affected; and public hearings. The first is all that is necessary when the question is one of interpretation of law and the field of choice is narrow. The second is successful when the interests involved are organized and united in view. The third is resorted to widely when interests clash and the subject is one affecting many people in a vital way. Unless the subject of the rule is of considerable importance to private interest, hearings are not attended, and the agencies must affirmatively, by in-

vestigation or conference or both, develop the considerations and viewpoints which must be weighed. Furthermore public hearings are of little value unless proposals are formulated in advance so that the discussion may be pertinent and not general.

Hearings on Rule-making Per Se

The Committee is impressed with the extent of the present use of public hearings. It does not recommend that a general requirement of public hearing be made in advance of the adoption of a rule. It does not believe that necessary or desirable either in the interest of private persons or governmental efficiency. The Committee does believe that wherever possible an opportunity should be given for persons to express their views.

To that end the Committee recommends that the existing general use of informal conferences and public hearings be continued, and further, that unless the agency certifies that stated circumstances require immediate effectiveness, the regulations shall not become effective until 45 days, or longer if so provided, after they have been published in the official Federal Register. This will give an opportunity for protest if any exists. Further to increase the possibility of participation of individuals in the rule-making process, the Committee recommends, and proposes in its bill, that persons be given the right to petition an agency for the issuance or amendment of a rule.

Annual Reports as to Rules

In order to inform Congress both of the rules made, the protests against published rules, the methods employed in making the rules, and the petitions filed for promulgation or amendment of rules, the Committee recommends further that a report be made annually by each agency to Congress setting forth all of these matters.

Court Review of Rules

The Committee does not believe that court review of rules apart from a concrete case is desirable or can be effective to safeguard any private interest. Its recommendations for declaratory rulings upon the application of persons showing an interest actually affected by a rule, subject to court review, go as far as the Committee believes it possible to go soundly in determining rights in advance of action.

"Office of Federal Administrative Procedure"

Finally the Committee recommends that an "Office of Federal Administrative Procedure" be created to perform—in addition to its part in the selection of hearing commissioners and acting as a trial board to determine any charges which might be brought against them—much the same function for the administrative agencies as the Administrative Office for the United States Courts performs for the Federal courts. Much can be done in simplifying and making more uniform such matters as admission to practice, pleadings, the issuance of subpoenas, in developing organizations for rule-making and regularizing types of procedures applicable to the formulation of the more usual types of rules, and in simplifying and reducing the number of reports now required to be filed with administrative agencies. In other words, there is need for continuing study of improvements in procedure and the stimulus of continuing recommendations and reports of improvements inaugurated in one or another agency.

ADDITIONAL VIEWS AND RECOMMENDATIONS OF MESSRS. McFARLAND, STASON AND VANDERBILT

NOTE—The following summary of the additional views and recommendations of Members McFarland, Stason and Vanderbilt was prepared for release to the press by Mr. McFarland. Repetition of names, etc., has been deleted.—Ed.

A Code of Fair Standards

A code of standards of fair administrative procedure for federal administrative agencies, which would, by statutory enactment, provide a code of ethics for these agencies, is presented in a statement attached to the report of the Attorney General's Committee. In [our] opinion the committee report falls far short of the requirements of an adequate basis for the improvement of American administrative law.

Chief Justice D. Lawrence Groner of the Court of Appeals of the District of Columbia filed a separate memorandum in which he concurs with the recommendation of the minority, though declining to support the legislative recommendations of either the majority or the minority of the committee.

Minority Code

The proposed bill of the minority members provides many safeguards not contained in the committee's proposal, nor in the recently defeated Logan-Walter Bill.

One of the most important features of the minority proposal provides that the functions of those presiding at hearings shall be "judicial in nature" and their conduct governed by "the accepted canons of judicial ethics." The effect of this provision in obviating ex parte consultations with officers and employees within an agency of which the defendant has no knowledge and which are not part of the record is obvious. The enactment of the proposed legislation would sound the death knell of review attorneys for it is contemplated that those who decide a case within an agency shall personally know the record on which the decision is based.

Another important feature of the code proposed by the minority is the provision that all publicity issued to newspapers by an agency shall give as much prominence to the position taken by the defendants as to that taken by the agency in the interest of fair play.

The statement goes on to say: "No careful student of administrative law would impair administrative efficiency, yet all desire that the procedures of the administrative agencies of government be fashioned to promote justice, fairness, and responsiveness to the public will as in a democracy they should be."

Fundamental Points of Difference

The minority members present separate views (1) on the need for the separation of the judicial function from

other activities of the administrative agencies, (2) the necessity of more effective judicial review of the decisions of administrative agencies, and (3) the high desirability of a code of legislative standards of fair procedure.

Separating Judicial Function

On the need for separation of judicial function from the other functions in the agencies, their statement points out that in administrative agencies the stages of "making and applying the law have been telescoped into a single agency. In this drastic concentration, many customary procedural safeguards have disappeared. The legislature no longer prescribes the rules, but these, as often as not, are incomplete, since it is easier for an administrative agency to judge each case than to attempt to formulate rules. The same agency which prescribes such rules is then also the investigator, the prosecutor, the judge, and to a large extent the appellate tribunal. It is given a staggering load of work and must necessarily delegate many of these functions to subordinates. There is no jury. One employee acts as prosecutor, another as presiding judge, and another as appellate judge."

The minority statement points out that President Roosevelt in 1937 submitted a plan based on the report of the Brownlaw Committee, for the separation of the judicial from the other functions of an agency and also discusses the majority report of the committee against complete segregation.

The minority goes on: "As a general policy, the whole Committee agrees that at least a separation of functions *within* each agency should be provided. The principal recommendation made in its report deals with the creation of special commissioners who shall hear and initially decide contested cases. We agree that, in the absence of complete separation, this general recommendation could be made to aid greatly in establishing impartiality in administrative adjudication, if coupled with adequate provision for judicial review and the enactment of an administrative code as set forth below. But in our judgment the recommendation cannot achieve the complete independence that is essential for the exercise of the adjudicatory function; and its use, therefore, should be confined to those cases where complete separation of functions is not possible."

Court Review

In its discussion of judicial review, which forms the second subject of the statement, the minority group declares that the question of separation of functions and the problem of judicial review are interrelated. On this point, the statement continues: "Where there is no complete separation of adjudicating functions, or where there is merely a partial or 'internal' separation of functions, the function of the courts becomes of paramount importance. Where powers of legislation, investigation, prosecution, adjudication, and appellate review are merged in a single agency, the courts must exercise broad authority to prevent abuses of such concentrated powers."

After considering the present practice, and its shortcomings, the minority adds: "Judicial review is one of the important balances of our governmental system. It should not be too broad and searching or it will hamper administrative efficiency. It should not be so restricted or so devitalized as to fail as a check upon palpable administrative error or abuse of power. The proper dividing line between the power of administration and that of the courts is not easy to draw, but the attempt to draw it intelligently must be made and certainly every effort should be made to eliminate the more obvious defects."

"The limits of judicial review are being decidedly narrowed, at least by some courts, so that important litigated issues of fact may be conclusively determined by administrative officers even though their decisions are based upon clear, palpable, and manifest error.

"Furthermore, the present standards of judicial review are unsatisfactory because of the very manner of their establishment. The scope of review is, in effect, being determined by the usual case-to-case procedure of the courts. This necessarily results in a microscopic view of the field as each point is pricked in the line of demarcation. The process is unfair to litigants and burdensome to the courts."

The minority makes the following recommendations on this topic:

"Until Congress finds it practicable to examine into the situation of particular agencies, it should provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability. As the Committee recognizes in its report, there are several principal subjects of judicial review—including constitutional questions, statutory interpretation, procedure, and the support of findings of fact by adequate evidence. The last of these should, obviously we think, mean support of all findings of fact, including inferences and conclusions of fact, upon the *whole* record. Such a legislative provision should, however, be qualified by a direction to the courts to respect the experience, technical competence, specialized knowledge, and discretionary authority of each agency.

"In the second place, Congress should classify types of cases and provide special degrees of review as to each. If, for example, Congress should feel that important issues arising under a regulatory statute, involving the limits of interstate commerce, should be protected by a closer judicial scrutiny than other issues, those issues could be singled out for review according to the 'weight of evidence' or some other appropriate formula. On the other hand, and again to offer only a single example, if Congress should desire only a minimum of review of fact questions arising under employees' compensation legislation, these too could be singled out for special treatment.

"Without attempting to analyze the various types of cases and to formulate the proper standard of review to be applied to each, a few general observations may be made. First, though the judiciary cannot be expected to do the work of administration, it should be utilized to protect against clear error. The graver the possible effects of the error, the more searching should be the judicial power of review. Secondly, when discretionary power is validly conferred by Congress upon an administrative agency, the courts should not interfere in its exercise unless there is an obvious abuse of discretion. Thirdly, the courts should pay due attention to the fact that the decision under review has been rendered by a tribunal trained by experience to decide the questions at issue. Fourthly, since *manifestly* incorrect decisions by administrative agencies should not be permitted to stand, the 'substantial evidence' rule, if it means a more restricted review, should be clarified by more precise legislative language.

"In view of existing deficiencies, we think it not sufficient to await and rely solely upon the benefits of a reorganization of subordinate administrative hearing officers and their procedure as recommended by the Committee, although such reorganization, if adequately directed by statute and faithfully carried out, will be productive of much good. It is unsatisfactory to the citizen and unfair to the courts to provide for judicial review without defining its scope.

In effect the courts are asked to choose between themselves and other public agencies, they are asked to assume or deny themselves power of review, and they are made a party to the result of conflicting statutory interpretations. Under these circumstances, it is natural that the courts should lean backwards to deny themselves powers which Congress has not clearly conferred upon them."

Comment as to Code

The third section of the report deals with the legislative standards of fair procedure. After discussing the growth of agencies in the last generation, and their lack of a definite pattern of operation and conduct, the statement declares that to meet the functions for which it was created it is necessary for the committee to propose some practical form of comprehensive statement of the "fundamentals of fair play." In presenting the need for a legislative statement of standards of fair procedure, the statement goes on to discuss the fear in some quarters, that there will be an "unduly hampering" of the agencies. The answer to this, the minority says, is to identify the few basic considerations and express them in terms of legislative statements of policy. Modern legislation governing men is cast in this pattern and it is "absurd" in a democracy to say that agents of the state cannot be similarly governed.

The report goes on to say:

"Obviously, without impairing government, the mere legislative statement of principles will go far toward dispelling the cloud that hovers over the administrative process, and will both effectively guide administrators and protect the citizen far more than judicial review of a particular administrative case available only to those few who can afford it. What is needed is not a detailed code but a set of principles and a clear statement of legislative policy. A very great service would be rendered by such a legislative guide for federal administrative action. The prescribed pattern need not be, and should not be, a rigid mold. There should be ample room for necessary changes and full allowance for differing needs of different agencies.

"Such a statement should be of invaluable assistance to the private persons on whom powers of government impinge, for they could learn more readily and clearly when, where, and how to proceed, and greater cooperation with government officials would be assured. It would be of inestimable value to American government itself by helping to alleviate the disrespect, distrust, and fear now felt by altogether too large a percentage of American citizens. Finally, there is a good reason to believe that administrative officials would sincerely welcome the assistance of a code of general procedural instructions which, instead of leaving them groping in the dark, would furnish them with a reasonably adequate pattern of action.

"There is another and perhaps even more important reason for seeking such a statement of the essentials of administrative procedure — a reason which involves the very fundamentals of government itself. An adequate pattern of procedure is imperatively needed to serve as a guide to and check upon administrative officials in the exercise of their discretionary power. Little has been said in the committee report regarding administrative discretion, but most people are aware of the great extent to which discretionary powers figure in contemporary government. The administrative agency finds itself employed as a principal means of injecting the element of discretion into government, and bringing the judgment of men to bear upon the multitude of situations arising in the daily enforcement of the statute law of the land. Unquestionably such discretionary power is a necessary and valuable adjunct of present-day government, but people generally do not blind themselves to the possibilities of abuse which it affords. No more satisfactory way can be found of eliminating apprehension and minimizing the hazards than by legislative statement of comprehensive standards of administrative procedure to chart the course of administrative action, to insure adequate publicity of process, to give the citizen every fair and reasonable opportunity to present his cause, and to insure that administrative officials act under circumstances best calculated to produce a fair and prompt result.

"Manifestly, the Committee has answered none of the real problems presented by the subject of administrative procedure if it does not provide alternative procedures for the making of the various kinds of rules and regulations which administrative agencies issue. In the matter of administrative adjudication, we must say whether or not, and in what respects, there shall be adequate notice; whether a party is entitled to see the evidence and know the witnesses against him; whether consideration of cases shall be confined to the record made or whether administrators shall be entitled to roam at large in securing additional private and untested information after a hearing is ostensibly closed; whether deciding officers shall make the decisions they purport to make or whether anonymous persons shall do so; whether the uncertainties in judicial review shall be dispelled and such review simplified; and a group of similar or related subjects."

ADDITIONAL VIEWS AND RECOMMENDATIONS OF CHIEF JUSTICE GRONER

DEAR Mr. Attorney General:

Mr. Acheson, the Chairman of your Committee, is today presenting to you separate reports with recommendations for improvement in administrative procedure. Each report bears the draft of a bill which its proponents believe will solve or aid in solving the question submitted to the Committee. Because the statement of views on behalf of Messrs. McFarland, Stason, and Vanderbilt, in my opinion, gives an accurate and realistic account of existing deficiencies and more clearly points the way to improvement, I have joined in its recommendations though, for reasons which follow, I am unable to agree that the proposed legislation sponsored by either group is entirely adequate. While either of the proposed bills would accomplish a decided improvement over present conditions, both fall so far short of meeting my views of the urgent needs that I feel obliged to exercise the privilege granted me by the Committee to state in a separate paper my recommendations on the form of the remedy and to express my criticisms of those proposed. What I advocate is as basic as the universally conceded right of every individual to claim the equal protection of the laws whenever he receives an injury and the consequent duty of government to afford that protection. I shall state my propositions generally and in the briefest possible form.

Basic Propositions

First. In general, the administrative officer or officers charged with the duty of enforcing a regulatory statute should be separate and distinct from the officer or tribunal charged with the duty of passing judgment upon alleged violations thereof.

Second. Assuming this complete separation of the functions of prosecutor and judge in administrative procedure, the findings of fact of the administrative officer or tribunal making an order or adjudication, if supported by substantial evidence, should be conclusive in any judicial review, except where a constitutional right or privilege is in issue.

Third. Where, from the nature of the subject matter, separation of the functions of prosecutor and judge in administrative proceedings would be impracticable or ineffective, the decision of the administrative officer or tribunal, including findings of fact, should be subject to review by an independent body, as in the case of the review of determinations of the Commissioner of Internal Revenue by the Board of Tax Appeals.

Fourth. In cases where a constitutional right or privilege is asserted, the power of judicial review should be as extensive as may be necessary, in the opinion of the reviewing court, to decide the issue.

Furthermore, an indispensable consideration in the selection and appointment of an adjudicatory officer should be his freedom from factional bias or partisan views, and his consequent ability to weigh the opposing arguments both on factual issues and on the meaning of the public policy which Congress may have expressed. For these qualities are essential to insure impartial judgment in controversies involving the government and the citizen. In this respect, I am in accord with views of the majority of the Committee that those injustices which have from time to time been the subject of criticism "can only be exercised by [the appointment to adjudicative positions of] wise and self-controlled men." Undoubtedly, as the majority suggest, the problem, at least in part, is one of personnel.

Separation of Functions

Referring back, then, to my first proposition, I think it both correct and fair to say that the whole Committee recognizes the plain undesirability of commingling the function of investigation or advocacy with the function of decision. The respective recommendations are nevertheless strikingly inadequate to remove and cure this defect. The majority insist that separation of functions may be satisfactorily accomplished within the agency itself by creating the office of hearing commissioner with the salary, tenure, and powers proposed. The separate views of three members doubt this and urge complete separation, but in view of the difficulties inherent in such an undertaking, accept temporarily the hearing commissioner plan with the additional provision for slightly greater independence. Thus in each plan, the commissioner is made a part of and subordinate to the several agencies, and his decision, both on the facts and on the law, is subject to the determination of the agency of which he is a part. The initial findings of fact and the initial decision is his, but the final decision on both the facts and the law is that of the agency, and while his decision may often receive due consideration, the power exists to ignore it and set it aside both as to facts and law; and in those cases in which the power is exercised, with no right of a review of the facts anywhere, present unsatisfactory conditions are left wholly unchanged. The controversy, in such circumstances, is finally adjudged and determined by the agency which has initiated and conducted the prosecution, and this, I think, is not only wrong but in the teeth of the principle that separation of the legislative, executive, and judicial is an essential condition of liberty.

What, then, is a practicable, workable, and at the same time fair and impartial method of giving every citizen both a reasonable opportunity to present his cause and the assurance that it will receive the dispassionate judgment which our American traditions demand? The question must be answered with due regard to the well recognized difficulties which complete separation of powers in the agencies will encounter.

A wholly independent board, on the order of the Board of Tax Appeals, with unrestricted power to review the adjudications of all agencies, would most likely insure impartiality and inspire public confidence. To such a plan there are, of course, objections. It would involve the creation of a large quasi-judicial body or bodies, and the attendant expense. A similar proposal, advocated by Senator Logan a few years ago, was abandoned.

Judicial review of administrative decisions might be expanded to include a review of the findings in the light of the weight of the evidence, just as a trial judge may set aside a jury's verdict on this ground. The opposition to this plan is generally based on the theory that it would create delay, increase the number of appeals, and clog the court dockets. Experience alone could prove whether this objection has any foundation, but the plan is unquestionably against the present trend of administrative legislation and would provoke the antagonism of many who now oppose any factual review of administrative decisions by the courts. I mention the method only to pass it by.

Independent Hearing Officer

In these restricted and difficult circumstances, I recommend the greatest possible independence for the new office of hearing commissioner, for without it the present evil continues and the attempted remedy is in vain. As I have pointed out, this complete independence is not accomplished by either plan. In large measure, it may be attained by providing that the new official be appointed by the proposed Office of Administrative Procedure wholly on its own responsibility, receive his salary from it and not from the agency's funds, be answerable to it alone, and be assigned by the Office to the hearing of cases as the needs of the agencies require. And, more important still, I strongly recommend that whenever on appeal to it an agency rejects the findings of fact of the commissioner, the agency's action in that regard be made subject to judicial review in the light of the court's own impressions of the weight of the evidence. Only by this, or some like method, can it be hoped to obtain that which it is the fundamental right of the citizen to have,—an open, fair, and unbiased determination of his rights when charged by the government with violation of a regulatory statute.

The correct decision of this question is one of immense importance. It should, in my opinion, be considered by Congress in the light of the real and true purposes which the founders of our government sought to achieve for themselves and their posterity. These were free action—free enterprise—free competition. They believed that equal justice between man and man and between citizen and state was one of the impartial rewards which encouraged to efforts that produced great and lasting results. Therefore they made no provision for exemptions from legal duty. What they did provide for was that there should be no oppression, no exaction by tyranny, no spoliation of private right by public authority, and that there should be a fair, honest, effective government to maintain the things which were thought to be the prerogatives of every individual man.

In the immense expansion of governmental authority, these principles should be the guiding star to a determination of this vexed question.

ADMINISTRATIVE PROCEDURE REFORM MOVES FORWARD

By Col. O. R. McGuire*

The Beginnings of the Reform

ELIHU ROOT, out of his experience as Secretary of War, Secretary of State, United States Senator, and a member of various tribunals, in his annual address of 1916 as President of the American Bar Association, invited the attention of the country to the need for reform in administrative procedure to the end that the regulators might themselves be regulated by law. Profound student that he was, Mr. Root had undoubtedly read the statements made by James Madison, the Father of the Constitution, that the great task was to form a government strong enough to control the governed and compel that government to control itself.

From time to time thereafter gatherings of lawyers heard addresses inveigling against the growth of government bureaucracy and the lack of adequate legal controls to insure that the government administrators themselves complied with the law with which they were insisting that private individuals should comply. Considerable impetus was given to the matter by Chief Justice Hewart of England in the publication of his *The New Despotism* and the subsequent appointment by Lord Chancellor Sankey of his Committee on Ministerial Powers to investigate the charges made by Lord Hewart against the English bureaucracy. A counterpart of *The New Despotism* was written and published in 1932 in the United States under the title of *Our Wonderland of Bureaucracy*, by the late James M. Beck, formerly Solicitor General, Assistant Attorney General, United States Attorney, and member of the House of Representatives, with whom I collaborated.

The former Executive Committee of this Association by a resolution early in 1933, created this Special Committee on Administrative Law to make studies, reports, and recommendations for the improvement of administrative law and procedure. From the outset these studies and reports have been limited to the Federal agencies and almost entirely to the procedure of such agencies.

I succeeded to the chairmanship after the 1935 meeting of the Association and the Committee came to realize that it should have the cooperation of corresponding committees in the various State and City Bar Associations. Much effort was expended to that end and the response has been very gratifying. With very, very few exceptions the various State and other local bar associations have constituted Committees on Administrative Law and these committees have been most helpful in explaining our problem to the memberships of their respective associations and otherwise in carrying on a great educational campaign.

Prior to this time the subject of administrative law and procedure was scarcely noticed outside of the lecture rooms in a few law schools but, thanks to the united efforts of many of the lawyers throughout the country, the subject is now a common one for editorials in newspapers and magazines, as well as the subject of resolutions of numerous great national organizations of businessmen, patriotic organizations, farmer and labor organizations, as well as others.

The Logan-Walter Bill

This bill began to take form in the autumn of 1936, when a crude draft thereof was considered at a joint meeting of the Association's Committee on Administrative Law and the Federal Bar Association's Committee on Administrative Law. The able student of administrative procedure and experienced administrator, John Dickinson, was then Chairman of the latter Committee and I was then both a member of that Committee and Chairman of this Association's Committee.

The draft constituted the basis of minute discussions and all shades of opinion and varied experiences were represented. That draft contained the basic outlines of the principles which were finally incorporated in the draft approved by the House of Delegates and the Board of Governors at Chicago in 1939, and which were in the Logan-Walter Bill as it passed both Houses of Congress and was vetoed by the President—a veto which was critically examined in an address by Roscoe Pound on January 25, 1941, before the New York State Bar Association and which is being published elsewhere in this issue of the JOURNAL.

Fundamentally that bill sought to correct two things in the administrative process: (1) The procedure for the issuance of rules and regulations, with judicial review thereof as a means of preventing the issuance of rules outside of the terms of the Constitution and the applicable statute; (2) The procedure for the administrative hearing and determination of controversies with officers and employees of the several agencies which could not be satisfactorily adjusted through existing informal procedures, with a broadened scope of judicial review as a means of preventing arbitrary, capricious, and erroneous administrative decisions.

This bill was the pioneer in its field. There were no precedents in either Anglo-American or Civil Law countries which could be used as guides. We had to attack the problem fundamentally and except for the cooperation of the Federal Bar Association's Committee on Administrative Law under the chairmanship of John Dickinson, and except for some suggestions made by the Assistant Solicitor General in response to a written request to Attorney General Cummings, no assistance of any moment was secured from the officers or employees of the Federal Administrative Service and little was secured by either the Senate or House Judiciary Committees when they had the revised drafts of the bill under consideration. The energies of many in that service were directed to defeating the bill, rather than to its improvement.

*Chairman, Special Committee on Administrative Law, ABA.

Origin of the Attorney General's Committee

Those of us who know former Attorney General Cummings are fully aware of his great interest in the improvement of procedure for obtaining justice. He personally took charge of the reform which had been urged by this Association for many years with respect to the rules of civil procedure in the courts. The bill for that purpose was enacted into law, the rules have been issued and are now in operation to the great improvement of judicial procedure in civil cases.

Shortly after my letter to him requesting his comments, suggestions, and criticisms in the autumn of 1938 concerning the draft of administrative law bill which my Committee was intending to submit at Chicago in January, 1939, as we had been directed by the House of Delegates at Cleveland to do, Mr. Cummings sent a letter of December 14, 1938, to the President suggesting that Congress be requested to authorize the appointment of a commission to function under the general supervision of the Attorney General, to study and submit recommendations for the improvement of the administrative process, saying he had little doubt that many of the difficulties of such process would disappear "if we are able to create an efficient machine which in actual experience functions in the public interests."

Shortly thereafter Mr. Cummings resigned as Attorney General and Mr. Murphy was appointed as his successor. On February 16, 1939, after the Board of Governors and the House of Delegates had approved the draft which became the Logan-Walter Bill and after the draft was under consideration by members of Congress, the President requested Mr. Murphy "to cause to be made an investigation and study of the entire problem with a view to recommending such action as you may deem appropriate."[1] No statutory authority was requested or secured for such investigation and study as had been recommended by Mr. Cummings.

By an order of February 23, 1939, the Attorney General created a committee of six to make the investigation and recommendation. This committee consisted of three representatives of the Department of Justice,[1] the Chief Justice of the United States Court of Appeals for the District of Columbia,[2] a former President of the American Bar Association[3] and a former Undersecretary of the Treasury who had returned to the private practice of law in Washington.[4] By a supplementary order of March 15, 1939, this Committee of six was increased by the addition of the Solicitor General who had participated in the debate on the draft of bill in Chicago in January, 1939, and five college professors, two of them being deans of their law schools.[5]

This Committee organized and there was employed a Director,[6] as well as a staff of young lawyers to make investigations and studies for the use of the Attorney General's Committee.

The activities of the staff were carried on under the supervision of the Director and their reports were taken up for discussion from time to time by the members of the Committee. Out of all this has come majority and minority reports from the Committee which covers some 505 mimeographed letter size pages, two drafts of bills—one by the majority and one by the minority—and an appendix of several hundred pages to the reports.

The Attorney General's Committee Reports and Drafts of Bills

I would be the last one to minimize the importance of these two reports and drafts of bills. According to my way of thinking, a far better job has been done by the Attorney General's Committee in the assembly of material, in the reports, and in the two drafts of bills than was done by the corresponding English Committee on Ministerial Powers. The latter report has been resting in the Archives of England since it was filed some twelve or thirteen years ago and no action has been taken by Parliament to remove the defects uncovered by Lord Chief Justice Hewart and to some extent admitted in that report. It is hoped that a similar fate does not overtake these reports from the Attorney General's Committee and I am inclined to think that if it does not, some of the credit will be due to the organized legal profession in America. I sincerely hope that these reports will receive attention and study by committees on administrative law of all bar associations, business, labor, farmer and other organizations in the United States.

It is obviously impossible at this time to enter into any detailed discussion of such a voluminous report within the space available in this issue of the JOURNAL. These reports should be read and studied by lawyers, businessmen, and others in the light of the reports made by this Committee on Administrative Law since 1936, the hearings in the Senate and House Judiciary Committees on what finally became the Logan-Walter Bill, and the debates in Congress on the bill, as well as the large amount of material placed in the Congressional Record on the subject during the years since 1928 when Senator George Norris, then Chairman of the Senate Judiciary Committee, introduced an administrative procedure bill and delivered an address on the floor of the Senate inviting the attention of the legal profession to the problem.

However, such studies will probably be impracticable except for a few, and therefore I am availing myself of the privilege granted me by the JOURNAL to present some of my views on the subject.

The Attorney General's Committee Reports and The Logan-Walter Bill

Personally, I believe that there is much good in both drafts submitted by the Attorney General's Committee and in the Logan-Walter Bill, and that if all concerned would forget any personal bias they may have, a combination of the better features of all three bills would result in a much better administrative procedure bill

1. James W. Morris, then Assistant Attorney General was made Chairman. Mr. Morris was subsequently appointed to the bench and resigned as Chairman, but continued as a member of the Committee. Carl McFarland was then Assistant Attorney General. He soon resigned to enter the private practice of law, but continued as a member of the Committee. Golden Bell was then Assistant Solicitor General, but soon resigned to accept a position in the Philippine Islands.

2. D. Lawrence Groner, who had been a practicing lawyer in Virginia and for many years judge of the United States District Court for the Eastern District of Virginia.

3. Arthur T. Vanderbilt.

4. Dean Acheson, who is now Assistant Secretary of State.

5. Deans E. Blythe Stason of Michigan and Lloyd Garrison of Wisconsin and Professors Henry Hart of Harvard, Harry Schulman of Yale and Ralph Fuchs of Washington University, St. Louis.

6. Walter Gellhorn, Professor at Columbia Law School, who, as a member of the Committee on Administrative Law of the National Lawyers' Guild, had joined in a report which was adopted by the Guild condemning the draft approved by the House of Delegates and the Board of Governors of the American Bar Association.

than any of the three would make if enacted into law.

I am happy to say that a most serious attempt has been made to accomplish that purpose in H. R. 3464 and S. 918, 77th Congress.

The Majority and the Minority reports and drafts of bill, as well as the separate statement submitted by Chief Justice Groner recognize and attempt to meet in varying degrees the fundamental weaknesses of present administrative procedure as pointed out in some of the reports of this Association's Special Committee on Administrative Law.

Rules and Regulations

All three reports and drafts recognize that the procedure now in use for the issuance of rules and regulations could be, and should be improved so that (1) Possible disputes and controversies may be prevented from arising or disposed of wholesale in many instances, instead of attempting to dispose of them by the case-to-case method; (2) There may be greater participation of both informed and interested private individuals in rule-making; and (3) That individuals may be informed in advance as to the interpretations which the administrative agency concerned places on the statutes which it is administering.

The Majority report and draft of bill would prescribe certain general rules as to publication of rules, permission to request rules, and the designation of units or persons in agencies to formulate, etc., rules with requirement that such rules be reported to Congress. This draft would also provide for declaratory rulings by the agencies concerned on particular relations.

The Minority draft attempts to classify the various kinds of rules and to prescribe a much more elaborate procedure for their formulation, issuance, and publication. This draft more fully recognizes the importance of proper rule-making in law administration and provides for declaratory judgments of the courts as to the validity of any rule where its application, or threatened application, interferes with or impairs, or threatens to interfere with or impair, the constitutional rights, privileges, immunities, or benefits of any individual.

Whereas the Logan-Walter Bill was based upon the assumption that no hearing would be requested on unimportant rules and orders, the Minority draft attempts to meet the problem by classifying types of rules and by providing for formal or informal hearings as to the more important types.

While differing in detail, the same end is sought to some extent to be accomplished as to rules by both the Majority and Minority drafts of bill and by the Logan-Walter Bill, though the latter bill and the Minority draft are more nearly in agreement as to the purposes to be accomplished and the procedures for accomplishing them.

Hearing Commissioners or Trial Examiners

All students of the administrative process recognize that the lack of independence on the part of trial examiners and the lack of weight given to their findings of facts and decisions are most serious defects.

The Logan-Walter Bill relied upon a prescribed method of procedure in the administrative building of records and on a broadened scope of judicial review of the record to improve the work of the trial examiners. Both the Majority and Minority drafts of bills would attempt the improvement by having the trial examiners appointed by the agencies concerned, with the approval of an Office of Federal Administrative Procedure which is to be manned by a Director to be appointed by and with the advice and consent of the Senate for a term of seven years, and two ex-officio members to consist of an Associate Justice of the United States Court of Appeals for the District of Columbia and the Director of the Administrative Office for the Courts. In addition, this Office of Federal Administrative Procedure would have certain jurisdiction to receive complaints with respect to rules, investigate them, and to make recommendations and reports concerning administrative practice.

In view of the fact that all Associate Justices of the United States Court of Appeals for the District of Columbia have full-time jobs, taxing both their energy and time and that the Director of the Administrative Office for the Courts likewise has a full-time job, it has not been pointed out in these reports how it is expected that these men will be able to devote any appreciable time to such ex-officio jobs. Further, it is a well known fact in Washington that members of the Cabinet and others who have positions requiring both their time and energy do not really function as ex-officio members of some other organization having any considerable duties. Thus it would very probably result in practice that the full-time Director, for all practicable purposes, would become the whole works in any such Office of Administrative Procedure to the extent that he did not clash with the appointing authority.

Further, no attention seems to have been given to the fact that it is difficult enough for the Attorney General or the Comptroller General, for instance, one holding a high Cabinet position and the other an office with a fifteen year tenure from which the appointing authority cannot remove him, to secure compliance with their opinions and decisions. How much more infinitely difficult would be the task of any such official as the Director proposed in these drafts as he sought to correct and improve the administrative procedure in numerous agencies of government—many of which he doubtless would never have heard of before his appointment to the seven year term of office. Obviously the agencies concerned would be much more familiar with their procedures than any such official could hope to be during a term of seven years. We have yet to learn that the giving of a commission of appointment to a man does not endow him with any more knowledge, courage, or energy than he had when appointed.

If the Attorney General's Committee was unwilling to trust the agencies concerned, with improved procedures and a broader scope of judicial review, to improve the work of their trial examiners, the question arises why that Committee was not willing to go the full length of recommending that the trial examiners in particular cases be made truly independent by authorizing the United States district judges for the several districts to appoint trial examiners for the hearings as they arose from time to time involving residents of the respective districts.

Formal Hearings

The Majority draft of bill, similarly to the Logan-Walter Bill, attempts to prescribe no new procedure for the informal hearing of controversies. The Minority draft makes elaborate provisions with respect thereto applicable generally to all the agencies. Such provisions could not possibly do any harm and their full utilization might prevent the time and expense of formal hearings.

Both the Majority and Minority drafts of bills would

prescribe a more or less uniform procedure for the formal hearing of controversies but both would use the same procedure as to the actual hearing in both the single-headed and in the multiple-headed agencies; that is, before a trial examiner or a hearing commissioner. This is in the interest of greater uniformity as to the actual building of the record but would necessitate some minor adjustments on appeal to the ultimate authority in such agencies because heads of operating agencies, such as the War, Navy, Agriculture and Labor Departments, for instance, rarely have the time—even if they had the training—to hear arguments and to personally decide such appeals.

However, there are a number of suggestions and recommendations contained in both the Majority and Minority drafts of bills which might well be incorporated into any administrative procedure bill given serious consideration for enactment into law.

Judicial Review

It is with respect to judicial review of administrative decisions that is found the greatest difference between both of these drafts of bills and the Logan-Walter Bill. The Majority draft of bill would make no change whatever in the existing procedure in the instances where now exists or does not exist judicial review. This majority draft of bill would leave judicial review of administrative decisions as it now stands, except that the majority would permit judicial review of declaratory rulings, if established, in the same manner and to the same extent that judicial review of quasi-judicial decisions of that agency may be reviewed.

The Minority draft would provide an enlarged scope of judicial review of quasi-judicial decisions, somewhat broader than in the Logan-Walter Bill, but would not attempt to prescribe a uniform procedure for such review or extend such review to agencies or decisions now exempted therefrom or as to which the statutes accomplish the same purpose by not expressly conferring jurisdiction on the courts to review such decisions. However, it should be pointed out that enlarged procedure for judicial review would be accomplished by the Minority draft through the provisions therein for declaratory judgments concerning rules and regulations as above mentioned. The latter review would be in the various district courts and would probably be more acceptable to lawyers than the corresponding provision in the more conservative Logan-Walter Bill which limited such reviews to the United States Court of Appeals for the District of Columbia.

In addition, the Minority draft recognizes the problem which was pointed out by the Association's Committee on Administrative Law at the convention in Philadelphia last September; that is, the problem of the admission, suspension, and disbarment of attorneys appearing before the administrative agencies. The Minority would include necessary provisions therefor in the draft of bill applying to the rules, etc., of the administrative agencies. This is probably an excellent idea but it is not likely that the profession will ever agree that, as officers of the courts, they should be suspended or disbarred from the practice by any administrative agency as proposed in the Minority draft; that is, by any agency of government other than by the courts.

Conclusion

I fully appreciate that the foregoing does not do full justice to the Majority and Minority reports and drafts of bills. No one could appreciate more than I do, on the basis of more than twenty years' service in the Federal administrative machine in various agencies and capacities, the tremendous job that the Attorney General's Committee has done, particularly the Minority, at least one of whom devoted more than seven months of constant work to the report.

Even if we cannot agree with all the conclusions reached by either of the two groups, we should recognize and appreciate the much good work they have done and the many excellent ideas they have incorporated into their respective drafts.

I conclude, as I began, with the statement that it should be possible to work out a draft acceptable to the vast majority of informed and unselfish lawyers who are determined to protect the institutions of their country and to maintain the dignity and responsibility of the legal profession—to the end that justice shall be impartial; that it shall be inexpensive; and that it shall be expeditious.

Printed Report Attorney General's Committee

AS the JOURNAL goes to press we are in receipt of the printed book entitled "Final Report of the Attorney General's Committee on Administrative Procedure," a volume of 475 pages. We are advised that 9,000 copies have been printed. The book carries a notation that copies are for sale at the office of the Superintendent of Documents, Washington.

The main Report covers approximately 200 pages. The so-called "Additional Views" of Messrs. McFarland, Stason and Vanderbilt, and also of Chief Justice Groner, cover approximately 50 pages. There follows an "Appendix" of about 200 pages.

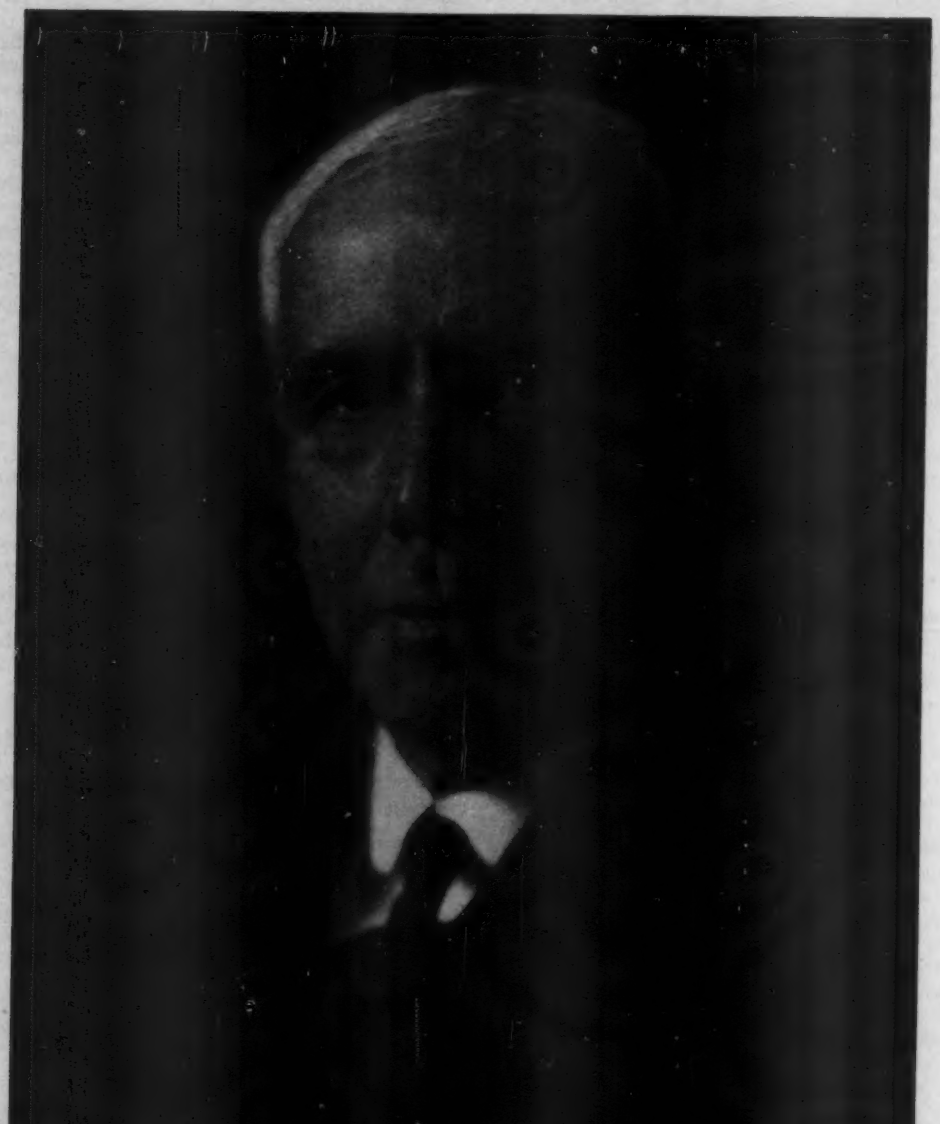
Drafts of Bills

The main report concludes with a draft of a bill to carry out the recommendations of the Committee. Attached to the report also is a draft of "A Code of Standards of Fair Administrative Procedure," prepared by the so-called "Minority" of the Committee. [Both these bills are analyzed in some detail in this issue.]

Appendix

Almost one half of the book (pages 250 to 275) is taken up by 13 research-studies, prepared by the Committee's Staff, under the supervision of the Director for the Committee, Professor Walter Gellhorn of Columbia University Law School. The topics discussed are:

A. Origin and Progress of the Attorney General's Committee on Administrative Procedure.
B. Federal Administrative Activity Affecting Private Interests by Rule-Making or Adjudication.
C. The Origins of Existing Federal Administrative Agencies.
D. Institution of Formal Administrative Disciplinary Action for Violations of Statutes or Regulations.
E. Procedures in Default Cases.
F. The Volume of Business of Administrative Agencies.
G. Time Consumed in Reaching Administrative Decisions.
H. Hearing Officers.
I. Utilization of Material Not Offered as Evidence.
J. Utilization of Written Evidence Not Subject to Cross-Examination.
K. Procedure for Issuance of Subpoenas.
L. Form and Content of Intermediate Reports and Final Administrative Decisions.
M. Reliance Upon Precedents by Administrative Agencies.



Harris & Ewing

FORMER JUSTICE VAN DEVANTER

HON. WILLIS VAN DEVANTER, former Associate Justice of the United States Supreme Court, who was appointed by President Taft in 1910 and retired in 1937, died at his home in Washington, February 8, of a heart attack at the age of 81 years. Since his retirement, the Justice had spent most of his time at his 800-acre farm near Ellicott City, Maryland.

During his years on the Supreme Court, Justice Van Devanter was considered the Court's most ardent defender of property rights and its most conservative member.

No other justices of the nation's highest court had experienced a more colorful background than he. His activities as a lawyer and judge reached back to the days when cattle thieves and vigilantes roamed the Wyoming bad lands, where he was then one of the few lawyers in a lawless land. In the stirring days when the great railroads were being cut through the western frontier, he made a solid reputation as a lawyer. He was a staunch Republican and was the friend of President McKinley and President Theodore Roosevelt. At the age of only 30, Mr. Van Devanter became Chief Justice of the Supreme Court of Wyoming. Shortly thereafter he was appointed Assistant Attorney General in 1897 and came to Washington. He probably would have returned to practice in Wyoming except for the fact that President Theodore Roosevelt appointed him to the United States Circuit Court of Appeals. His love for politics in the right sense was generally known. He had been chairman of the Wyoming Republican state committee for a number of years and was national committeeman from Wyoming for some time. However, when once on the bench, he chose to stay there until the end.

London Letter

More War Damage

ONLY a few days after December's London Letter had been dispatched the Inns of Court, and more particularly the Temple, sustained such damage from high calibre explosive bombs that the previous experience fades almost into insignificance by comparison. It may well be that the Inns of Court and, in fact, any places or institutions which have to do with the administration of law and justice are regarded by those who would establish a "new order" for Europe as "military objectives." If this is so then they may truthfully claim to have hit one. This new effort of the world's enemy took place during the night [date censored]. Lincoln's Inn received damage to their Hall and Library, caused by blast; Gray's Inn, rather more fortunate, sustained damage to Verulam Buildings and had many broken windows elsewhere in the Inn; but their Hall, Library and Chapel escaped. The devastation in the Temple, however, and more particularly the Middle Temple, was appalling. The scene which greeted members of the Inn upon their arrival in the morning of the [date censored] was one of utter desolation. Every building was of a uniform dust color, and glass, bricks and masonry covered most of the Courts. Pictures have appeared in the press showing various aspects of the damage done, but it had to be seen to be properly appreciated. [One sentence censored.] It struck the south side of No. 3 Elm Court and the explosion which followed was terrific.

It is only after a lapse of time, during which much of the fallen masonry has been cleared away, that it is possible to gain an idea of the damage done. Nos. 3 and 4 Elm Court were entirely demolished (No. 1, it will be remembered, was demolished in an earlier raid) and Nos. 2 and 5 are so badly damaged that it is more than likely that their demolition will have to be completed. Thus the whole of Elm Court will probably have to be rebuilt.

Not a single building in Pump Court escaped damage, though some suffered less than others. Nos. 1 and 2, which are farthest from the scene of the explosion, got off with smashed windows and doors, and slight damage to the roofs. No. 3, which had also suffered some damage earlier, is now half demolished and will have to be rebuilt. No. 4 was severely damaged, but it is thought that it will be possible to repair it. No. 5 has had all the tiles stripped from the roof and windows shattered. The damage to No. 6 is an interesting indication of the force of the explosion. A large stone, weighing over a ton, was hurled from Elm Court, over the roofs of buildings opposite and crashed into a set of Chambers, making a large hole in the wall.

In the Cloisters, Lamb Building, Essex Court, New Court, Plowden Buildings, Temple Gardens and Garden Court, windows have been shattered, and in many cases doors have been torn from their hinges, ceilings have fallen, and interior panelling has been broken and displaced. The roofs of the two oldest buildings in Brick Court (Nos. 2 and 3) have been shattered. It was in No. 2 that Oliver Goldsmith died on the 4th April, 1774, and there is an inscription to that effect on the left hand side of the window facing Middle Temple Lane. Crown Office Row is very seriously damaged, and, although it may be possible to repair part of it, it seems likely that some parts will have to be pulled down and rebuilt.

Though all this wanton destruction is saddening to behold, the greatest blow of all is the damage done to the magnificent Hall of the Middle Temple—one of the finest specimens of Elizabethan architecture in the country; the Hall in which Shakespeare's "Twelfth Night" was first performed; in which Queen Elizabeth herself had been entertained, as well as monarchs of more modern days; the Hall where Sir Walter Raleigh and Sir Francis Drake had dined and, coming down to recent times, where the Bench and Bar of England gave a dinner to the Hon. William H. Taft, former Chief Justice of the United States of America, in 1922, and where, a few days earlier he was called to the Bench of the Middle Temple as an Honorary Bencher, as had the Hon. Joseph Choate and the Hon. John W. Davis before him, and where Frank B. Kellogg, Hon. Charles E. Hughes and Hon. Charles Gates Dawes have since become Honorary Benchers. Many Members of the American Bar will still retain happy memories of the welcome accorded to them and the entertainment offered to them in this Hall on the occasion of their visit to England in 1924. They will remember the Minstrels' Gallery above the beautifully carved oak screen at the East end of the Hall, believed to be the product of Italian workmanship. A great hole was blown in the wall at this end by the force of the explosion and the falling masonry carried away the gallery and screen, on to the floor of the Hall, where they were smashed and buried under piles of bricks and timbers. The Chancellor's window in the South Bay and the window in the North Bay were also smashed as the blast continued its way through the Hall. The Benchers of the Inn must be more than pleased that, as a result of their foresight, the valuable glass and pictures had been removed. Much of the interior panelling has been damaged and torn from its fixings and many of the panels containing the coats of arms of past Readers—a feature of the Hall's decoration—have been torn from the walls. At the East end of the Hall the beautiful hammer-beam roof has been badly smashed, but the remainder seems to be unharmed. Many tiles were blown from the roof and the glass and louvers of the Cupola were smashed, although no other damage seems to have been done to this part of the structure. Some damage was done to tables, forms and chairs, but it is gratifying to know that the famous "Drake" table (known as the Cupboard), which was made from wood taken from Sir Francis Drake's exploring ship, the Golden Hind, is undamaged, as is also the High Table, presented to the Inn by Queen Elizabeth and made from wood taken from the great forest of Windsor. When some of the debris had been cleared from the Hall it was found that a writing desk, a chair and three pieces of silver plate had been blown in from No. 3 Elm Court.

Damage has also been done to the Master Treasurer's Room, the Parliament Chambers and other rooms used by the Benchers, as well as to the Treasury Office. The Clock Tower of the Hall was also partly demolished. It is believed that all damage done to the Hall can be repaired, including the Minstrels' Gallery and Screen.

The Middle Temple Library escaped the full force of the blast, though nearly all the stained glass windows were shattered including the very handsome one over the entrance at the North end. This window contained the coats of arms of all the Masters of the Bench who were living when the Library was opened by King Edward VII (then Prince of Wales) in 1861. Oddly enough the plate glass in the Library was not broken and, though the whole room was literally smothered with splintered glass and soot, no damage was done to the books. Fortunately the historic Temple Church has, so far, escaped with only a few windows broken.

The air-raid shelter under 6 Middle Temple Lane and 3 Elm Court, in which seven people had taken refuge, was damaged, and the occupants buried, but fortunately as it happened, the Inn's fireman was one of the number and, cutting a hole with his axe, he and two other members of the staff were able to rescue all of them, without injury to any. It is a truly remarkable fact that, in spite of all the devastation caused, there were no casualties, except one case of shock which was successfully treated in the first-aid room provided by the Middle Temple.

It is, of course, quite impossible to estimate the cost of repairing the damage and erecting new buildings in the Temple, but it may well approach the figure of half a million pounds sterling—a sum which may be difficult to find after the war.

Carrying On

The Inns of Court are now recovering from the many shocks they have experienced and are carrying on. The Inner Temple Library re-opened on the 4th November and, although it is not yet possible to use all of the rooms, the service which this excellent Library offers to its Members is being maintained as usual. Lunches are served to Inner Templars in the Niblett Hall. Lincoln's Inn are using their Old Hall, which was restored in the year 1928. It was necessary to close the Middle Temple Library for one day only, for the purpose of cleaning and removal of the glass which covered the floor and tables in the main room. Lunches are now provided by the Middle Temple in their Common Room under the Library. It will be a long time before they can be resumed in the Hall.

Calls to the Bar

It may be interesting to note that, after more than a year of war, no less than forty-two students were called to the Bar in Michaelmas Term 1940. Of this number, the Middle Temple headed the list with twenty-one, the Inner Temple and Gray's Inn each had eight and Lincoln's Inn five. For the first time in history the Call at the Middle Temple took place in the Library, as the Hall is too badly damaged to be used. The procedure on Call to the Bar has changed very little over a long period of years. A contemporary manuscript of the time of Charles I, known as the Brerewood MS., describes it thus: "Note there is no ceremony used in the Callinge of any to the Barre more than that their election is at the end of the Parliament declared by the high Treasurer to the rest of the Barristers who are then called to be enformed what the Benche hath resolved on in that meetinge. Theire names are then entered by the Under Treasurer And the next daie immediately before dynner they are called to the Cubbord where the Treasurer of the House with some of the Benchers assistinge him cause the parties called or elected one after the other to take the oath of Supremacy which beinge donne all is ended And they remayne Utter Barristers." It was customary also for each barrister on call to the Bar not only to take the oath of allegiance in Hall, but also to sign the "Swearing Roll." There is still very little ceremony in calling to the Bar. The students, in order of seniority, are presented by the Reader to the Treasurer, who signifies his pleasure in calling them to the Bar, after which each newly called barrister signs his name in the Call Book kept for the purpose and the ceremony is at an end, except that the Master Treasurer gives a short address on the honour of the profession of Barrister-at-Law and the opportunities which it offers to those who nobly strive to carry on its best traditions. After the passing of the Promissory Oaths Act in 1868, which substituted a Declaration for the Oath in certain cases, the general "Swearing Roll" in the Court of King's Bench was discontinued. A Declaration in Hall was also substituted for the oath, but this Declaration was shortly afterwards dispensed with.

Viscount Rothermere

By the death of Viscount Rothermere at Bermuda on the 26th November last the Middle Temple lost one of its most famous honorary Benchers. He was the second son of Alfred Harmsworth, who was admitted a student of the Middle Temple on the 1st May, 1866, and called to the Bar at that Inn on the 7th June, 1869. Lord Rothermere, who was the younger brother of the late Lord Northcliffe, was born in 1868. In the year 1910 he was created a baronet and in 1914 a baron. A viscountcy was conferred upon him in 1919. During the last war he occupied the position of Director-General Royal Army Clothing Department and later was, for a short time, Air Minister. He was particularly well known, not only for his great influence and success in the newspaper world, but also by his very generous gifts for the encouragement of learning. He endowed the King Edward VII Chair of English Literature and the Vere Harmsworth Chair of Naval History at Cambridge, and the Harold Vyvyan Chair of American History at Oxford University. In 1924 the Middle Temple received from Mrs. Alfred Harmsworth and Lord Rothermere the sum of £60,000 to establish an endowment to be known as the Alfred Harmsworth Memorial Fund, in memory of Alfred Harmsworth. The gift was used, among other purposes, to provide Harmsworth Law Scholarships. These scholarships are of the value of £200 a year and are tenable for three years. Until the beginning of the present war eight or more scholarships were awarded each year, but they have now been suspended until further notice as many students who would normally be eligible are absent from the Inn on war service. Candidates for these scholarships must be members of the Middle Temple intending to practice at the English Bar, and must be present or former resident male members of a College at either Oxford or Cambridge. In 1937 Lord Rothermere handed over to the Benchers of the Middle Temple securities to the value of £40,000 to be added to the Harmsworth Fund for the main purpose of increasing the number of scholarships to be made available under it. These two large sums by no means make up the full total of his monetary gifts to that Inn and in addition, he has been a most generous benefactor to the Society in gifts of Elizabethan and Jacobean silver. He was made an Honorary Bencher on the 3rd May, 1928, during the Treasurership of the First Marquess of Reading, thus acquiring the distinction of being the only non-legal honorary Bencher on the Roll of the Inn.

Temple. S.

"DIVERSITIES OF THE LAW"

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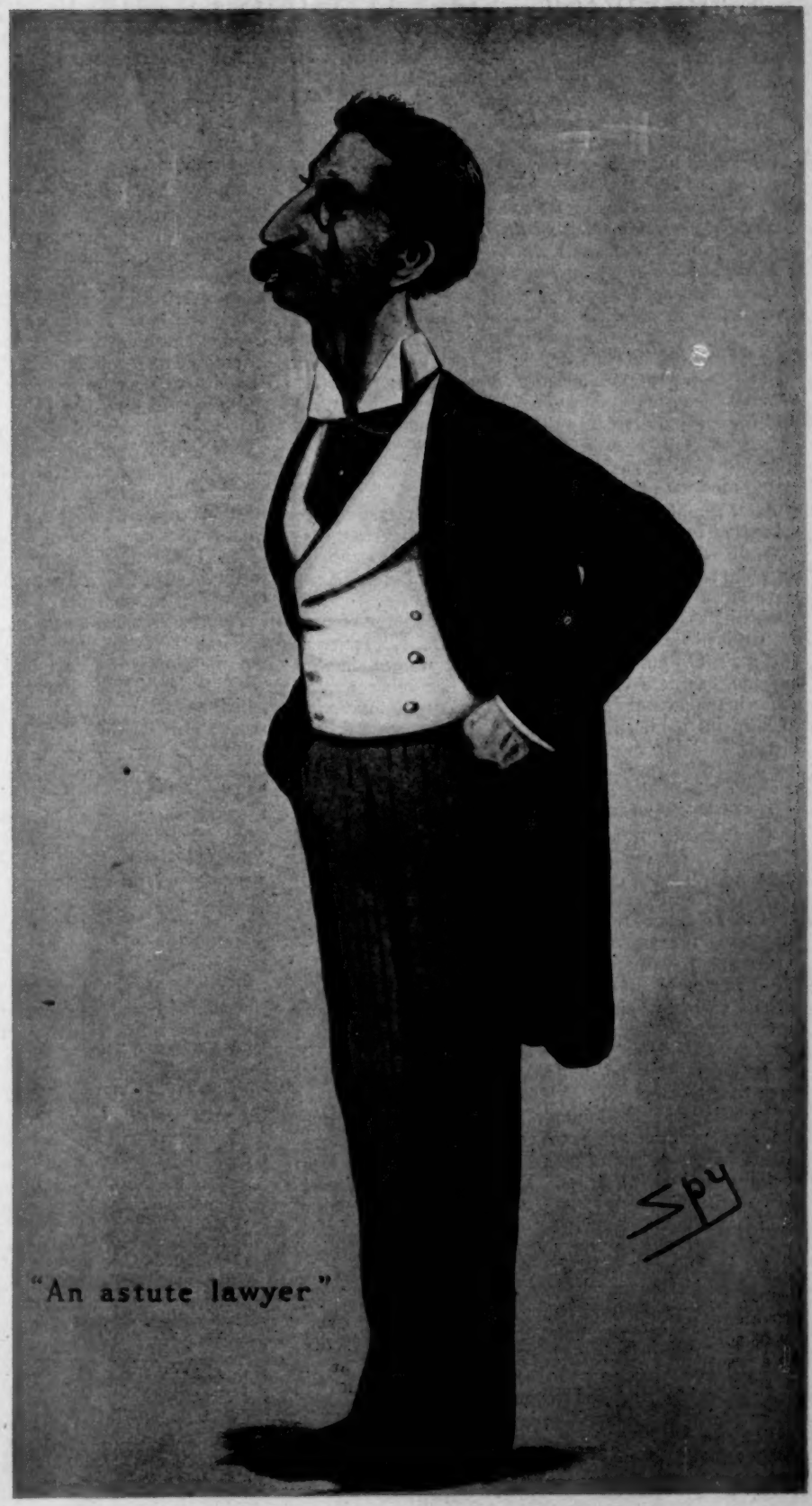


CARTOON BY "SPY"
From *Vanity Fair*
London—Sept. 2, 1876

IMPROVING THE ADMINISTRATION OF JUSTICE

New Colorado Civil Rules of Procedure

By G. Dexter Blount
of the Denver Bar

[*Editorial note. The Special Committee on Improving the Administration of Justice, of which Judge Parker is chairman, has chosen to submit this article because of the importance of the improvement of practice and procedure in the state courts, and because here is told the plain story of how that result may be most perfectly and most easily accomplished through a close assimilation to the Federal Rules of Civil Procedure.*]

THE object of this article is to give information regarding the remarkable accomplishment of the lawyers and judges of Colorado in thoroughly revising and modernizing the rules of practice and procedure in civil suits in the Courts of Record in this state. Those results were obtained by assimilating the state practice to the new Federal practice.

After the new Federal Rules of Civil Procedure were submitted by the Supreme Court to the Congress, lawyers in several states planned to revise the rules of procedure regulating the practice in their State Courts to conform substantially to the Federal Rules, so as to establish, as nearly as might be, a uniformity of procedure in their Federal and State Courts. There were two main objects to be attained. One was to simplify and clarify State Courts practice. The other was to make it unnecessary for lawyers to learn, or to attempt to keep in mind, two systems of civil procedure, conflicting in their requirements, and confusing to those lawyers whose practice made it necessary for them to appear in both the Federal and the State Courts.

The desirability of a complete revision of the rules of practice and procedure in Colorado has long been manifest. Colorado is what is known as a "Code" state. Its Code, modeled indirectly after the Field Code of New York, was enacted by the Legislature in 1887. Since then the Code has been amended repeatedly. It contained ambiguous and uncertain language and inconsistencies which have necessitated judicial interpretation many times. Some procedural provisions which would fit properly in the Code appear in the general statutes. Further confusion has resulted from the Colorado Supreme Court's adopting, promulgating, amending and otherwise changing its own rules from time to time.

Some lawyers in Colorado became enthusiastic over the idea of attempting to change the rules of procedure in the courts of record of this state to conform to the new Federal Rules. Prior to the annual meeting of the Colorado Bar Association in September, 1938, they made extensive studies of the rules which had been approved by the Supreme Court of the United States in December, 1937. At that meeting they delivered addresses on the more important innovations provided in the Federal Rules and urged the advisability of adopting similar rules for the Colorado practice. As a result, the meeting adopted a resolution declaring, in substance, that as soon as practical the Colorado Code should be amended to conform to the new Federal Rules and that a committee be appointed by the Association to work with the Supreme Court of Colorado in studying the Rules and the Colorado Code of Civil Procedure and in drafting a new Code for Colorado in line with the Federal Rules, for adoption by the Colorado Supreme Court. The incoming president of the association appointed Col. Philip S. Van Cise of Denver, chairman of the committee and authorized him to select the other members.

The committee was faced with difficulties arising from a critical attitude of influential members of the bench and bar. Many lawyers did not look with favor upon the proposal to change the methods of conducting litigation with which they were familiar. Some objected to being required to learn new ways of prosecuting and defending law suits. Some were apprehensive that new rules would not result in improvement but would merely substitute one set of technicalities for another. The conservative spirit, and the contentious spirit, which are characteristic of lawyers, caused some to rebel against what they considered nothing more than a new and fanciful experiment. One serious job of the committee was to convince dissenting members of the bar that their arguments were illogical and their opposition unjustified.

Another serious question was raised by several of the judges of the Supreme Court. It was whether or not the Supreme Court had inherent power to adopt, without legislative sanction, new rules of procedure which would repeal, either directly or by implication, sections of the Code and of the general statutes. The Supreme Courts of some states, notably Nebraska and Oklahoma, held that they had inherent power to regulate by rule the practice of law and under that power to establish an "integrated bar" for that state. There are also decisions as in Illinois holding that the state Supreme Court, being the head of the state judicial system, had inherent power to prescribe by rule the qualification for admission to the bar. These states are divided as to the extent to which by rule of court practice and procedure is embraced in the inherent power of the court.

To remove any doubt, the president of the association, with the cooperation of the chairman of the committee, caused to be introduced in the Colorado Legislature which convened in January, 1939, a bill granting the Supreme Court full power and authority to adopt new rules. This was enacted promptly by the unanimous votes of the members of the Legislature, as its second statute. It (Session Laws of 1939, Chapter 80) is as follows:

> The Supreme Court of the State of Colorado shall have the power to prescribe, by general rules, for the courts of record in the State of Colorado the practice and procedure in civil actions and all forms in connection therewith, provided, that no rules shall be made by the Supreme Court permitting or allowing trial judges to comment on the evidence given on the trial. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants. Such rules shall take effect three months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force nor effect.

After the statute was enacted the judges of the Supreme Court advised the chairman of the committee and the president of the association that the Supreme Court would take no official part in the work

on the rules, but would await their completion by the committee and then make its decision.

The chairman of the committee devised, with almost mathematical precision, the details of an ambitious program. The committee then decided that it would not only recommend the adoption in Colorado of nearly all of the improved methods of civil procedure contained in the Federal Rules, but would completely revamp the Code sections not covered by the Federal Rules and would also rewrite the rules for procedure in the Supreme Court, and thus supersede conflicting procedural statutes. It was their purpose to phrase the new rules in language that would avoid all uncertainties, ambiguities, inconsistencies and causes for misunderstanding.

This was an arduous undertaking. It required critical, and almost microscopic, examination of the Code, the Federal Rules, the Rules of the Supreme Court of Colorado and many of its decisions, and of many of the general statutes of Colorado. It also required studious examination of the decisions interpreting the Federal Rules.

To carry on the work effectively the original committee was enlarged to seventy-five members, consisting of lawyers in every part of Colorado. The enlarged committee was divided into fifteen sub-committees. To each sub-committee was assigned for intensive study a section of the outlined work, such as "Pleading," "Depositions," etc.

The committee met more than once a week over a period of a year and a half. During the first few months it met every Monday night and thereafter every Monday and Thursday night. It also conducted several two-day institutes with sessions each morning, afternoon and evening. The minutes of each meeting, showing the results accomplished, were mimeographed and distributed to the committee members, together with the agenda for the next meeting. At these meetings reports of the sub-committees were received, discussed, debated, and approved or disapproved in whole or in part. The reports of the sub-committees disclosed the conclusions reached in meetings held by them during which they had discussed the results of their individual and joint studies of the subjects assigned to them. During their work they had examined, minutely, the 86 Federal Rules and the decisions interpreting them, the 479 Sections of the Colorado Code and the decisions interpreting them, the Colorado Supreme Court Rules and the Colorado statutes which contain procedural provisions. Many Colorado lawyers, particularly in Denver, who served on the committee and the sub-committees devoted to the work a large portion of their time for the period stated.

The work of the members of the committee resulted in the preparation of a first draft of the proposed new rules. This draft was printed in April, 1940 (showing the results of about one year's industrious efforts), and distributed to the entire committee, and to some other lawyers, and judges, in Colorado and elsewhere, for their examination and criticism. A Revision Committee of fifteen members, all from Denver, and selected from the most active members of the entire committee, was appointed to check over the printed draft, and to make corrections in phraseology, and punctuation, and also in substance. Considerable interest arose among lawyers in other states. Two members of a prominent law firm in New York City enthusiastically studied the proposed new rules for several weeks and then made valuable suggestions as to changes, some of which were adopted by the committee.

By July 1, 1940, the second draft of the rules was completed, printed, and distributed to all lawyers in Colorado, with a request that each one study the draft and send his comments to the chairman. Thereafter, and prior to September 1, the committee considered all suggestions received, and prepared and distributed fifteen mimeographed sheets of amendments to the second draft of the rules.

A legal institute on the new rules was on the program of the next annual meeting of the Colorado Bar Association, held in September, 1940. At that time the entire Revision Committee made detailed reports on the work that had been done, and sat on the platform, as experts, to answer questions about the rules that members of the association might ask. After full discussion the members of the association present voted unanimously in favor of a resolution approving the rules and amendments as then submitted, and recommended that the same, with any further amendments by the committee, be adopted by the Supreme Court.

The committee continued its work until the latter part of October. On November 5 it submitted its report in final printed form to the Supreme Court of Colorado with a recommendation that the new rules, as thus prepared, be adopted.

The judges of the Supreme Court then studied the proposed new rules. Its Rules Committee conferred with the chairman of the committee of the association and requested further comments from that committee and other members of the bar. The result was that a few additional changes in the proposed rules were made by the Supreme Court.

Finally, on January 6, 1941, the Supreme Court entered its order promulgating the new rules, to become effective April 6, 1941. On that day all provisions of the Colorado Code prescribing the manner in which civil suits shall be started and conducted in Courts of Record, except those regulating special proceedings, such as Workmen's Compensation actions, etc., will stand repealed.

The new rules are entitled "Colorado Rules of Civil Procedure." They have been ordered printed in the Colorado Reports, and two printers have already issued them in pamphlet form. In order that such confusion may not occur in Colorado as occurred in New York after the adoption of the Field Code in the middle of the last century, plans were made for legal institutes before the rules become effective. The judges and their clerks will hold one conference, called by the Denver district judges, and the lawyers will hold four conferences in different sections of the state. Each institute will be a two-day conference with sessions morning, afternoon and evening, devoted entirely to familiarizing those present with the new rules. A special course of study has been prescribed by each of the three law schools in Colorado.

Space will not permit a discussion in this article of the many changes effected by the new rules in the Colorado practice and procedure. But attention may be called to several features.

The Colorado Rules are numbered 1 to 120. The Federal Rules, most of which are included in the Colorado Rules, are numbered 1 to 85. Corresponding Colorado Rules are numbered the same as the Federal Rules and are paragraphed in the same way, so that decisions interpreting the Federal Rules may be used readily and with the least confusion in the interpretation of the Colorado Rules. The Colorado Rules 97 to 120 cover subjects that are not covered by the Federal Rules.

The Colorado Rules do not follow the Federal Rules as to the starting of a suit or review by an Appellate Court. Following the present Colorado practice, they provide that a summons may be issued either by an attorney before or after the suit is docketed, or by the clerk. Because of provisions in the Colorado Constitution, a writ of error instead of an appeal was provided for review by the Supreme Court.

The forms of pleading recommended by the Supreme Court of the United States as an appendix to the new Federal Rules of Civil Procedure have been recommended by the Supreme Court of Colorado, with some modifications to fit local practice. This makes for extreme simplicity in pleading. For example, the body of a complaint in a suit on an open account need state nothing more than—"Defendant owes plaintiff ——— dollars according to the account hereto annexed as Exhibit A."

It would be impossible to give too much praise to Col. Van Cise, for the work done by him as chairman of the committee in the preparation of the Colorado Rules of Civil Procedure. He worked persistently and continuously and laboriously to accomplish the desired results. He demonstrated splendid executive ability and inspired the other earnest and hardworking members of the committee.

It has been said of the Federal Rules of Civil Procedure that they have been "heralded as the most important step taken to improve judicial procedure in this country in fifty years," and that they "have simplified procedure and clarified issues of trials in the Federal Courts, thus expediting litigation." It would seem to be equally true that tests will demonstrate that the Colorado Rules of Civil Procedure will be as beneficial in improving the conducting of civil litigation in courts of record in Colorado as the Federal Rules have been in the Federal Courts. The Colorado Rules are flexible and liberal. They should reduce dilatory motions and quibbling arguments on unimportant points to a minimum. They should enable litigants to get to the meat of their controversies promptly and effectively. They will require more of an application of common sense than heretofore in the weary course of litigation. They may, and probably should, become a model for similar efforts in other states where lawyers are convinced that methods of litigation should be simplified in the interests of litigants and the public, and tend to promote the welfare of lawyers and decrease criticism of them by laymen.

COMMITTEE ON NATIONAL DEFENSE

Comment on Current Activities

BY EDMUND RUFFIN BECKWITH, CHAIRMAN

IT IS reported that more than 165,000 copies of "A Manual of Law"* have been distributed by Selective Service to Persons connected with the System and the bar generally, so that the Manual should now be in use all over the country. The Committee hopes to receive specific suggestions for its consideration in connection with any future supplement or revision of the work.

Annotations

Increasing attention is being given by state committees on defense to annotations of the material included in or indicated by the Manual, such as statutes enacted or pending in various states for the relief of soldiers and sailors against the collection of taxes and private debts, administrative rulings as to civil service and other employment rights, rules of court governing stays of proceedings and judgments by default. These typical subjects and others are being considered both for the sake of desirable action within the states and with regard to some degree of uniformity among the states. Information and comment on such matters are being assembled by the Committee and will be available as desired.

State Committees

About thirty of the state bar associations have organized their committees on national defense, and several more have the proposal in the hands of their governing bodies whose favorable action may be expected promptly. The plan advocated by this Committee for such organizations assumes that it is desirable to have as much similarity in form as local conditions will permit, in order to facilitate communication among the committees and prompt action whenever necessary. The plan also assumes that for the purpose of bringing into each such committee the most active lawyers in every section of the state it is immaterial whether or not such men are members of any bar association, because the one essential purpose is to provide a mechanism for contact and consultation among all the practicing lawyers of each state.

The plan takes account of the state bar association, the strong local associations, and the Advisory Boards for Registrants of which there is at least one in every county. It proposes that the local associations accept responsibility to the extent convenient for communication and other contact with all lawyers in counties adjacent to their own, and the state association will then create the state committee on national defense by appointing on it men chosen by such local associations together with representative lawyers from all other sections of the state, many of whom will be found to be members of the advisory boards.

The Committee will distribute in the near future its Memorandum No. 3 which will treat in detail the projects, so far as they have been presently developed, which should engage the attention of state committees. One pressing and continuing duty of such committees relates to the maintenance and replacement of the personnel of Selective Service so far as it comprises lawyers, and another relates to the rules of court already mentioned above. Other projects reflect the contributions of lawyers to the public morale, to what may be called intelligence work, defense legislation and to the improvement of the administration of justice. Many fields of activity have not yet taken definite form but it requires no gift of prophecy to foresee that the work of the bar for the common defense will continually expand.

*See February Journal, p. 88.

Conservation of Practice

The Committee has been favored by a number of local associations with reports of the action taken relating to the conservation of practice of lawyers going into the armed forces. The consensus seems to be that a local committee should undertake to provide substitutes for lawyers who may prefer them to anyone directly selected; and that such a committee should obligate any of its members who acts as such substitute not to represent any client of the lawyer in service after his return to his practice, regardless of the client's wishes.

It seems also to be the general opinion that agreements between the absent lawyer and his substitute should be in writing and registered with the local bar association, and that notices given to clients upon the departure and return of the men in service should be in forms approved by the association. With respect to the devision of fees received from any client of the absent lawyer, it is understood that the standing Committee on Professional Ethics and Grievances will at an early date promulgate an opinion.

The Committee on National Defense desires to be informed as to the action of any bar association relating to the conservation of practice, and particularly with regard to the number of instances in which association committees are called upon to provide substitute attorneys.

Studies of Function

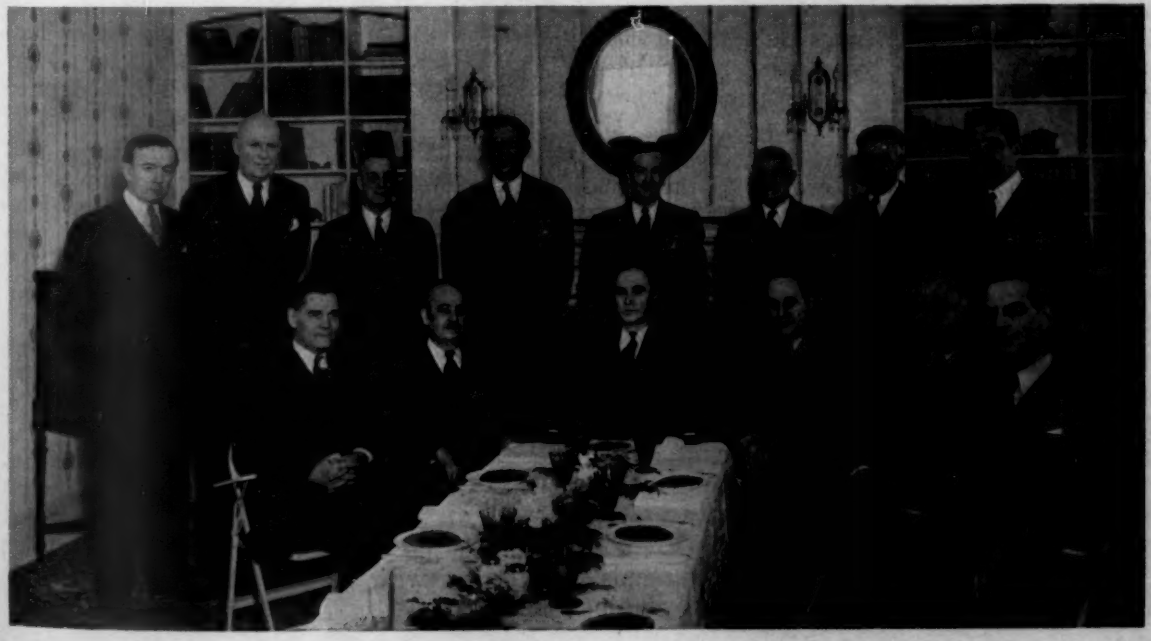
The Committee believes that among several theories which it has advanced with respect to the organic action of the bar under present conditions the one which has met with the readiest approval in principle is that a careful study should be made of all the probable directions in which useful work might be done by "the organized bar as counsel to the public as client."

On January 28, Ralph C. Lashly, whose services were made available to the Committee by President Lashly's firm, became the first of what the Committee hopes will be a long line of men to engage in such a study of the desirable channels of action. Beginning with the members of the official group of advisors to the Committee, and continuing from office to office through one legal section after another in the manifold divisions of Government, inquiries are being made wherever there seems to be any probability that a useful project might be uncovered. It is a significant fact that very few people seem to have grasped the concept that the organized bar is a public agency. The type of research proposed by the Committee may turn out to require a good deal of repetition before it can get down to the essential facts, but the theory upon which the work is proceeding is so persuasive that everything necessary to establish it ought to be done.

The Committee has endeavored to make available to the Section of Bar Organization Activities suitable reports on the profession's relation to national defense, for consideration at the regional conferences conducted by that Section. In line with this kind of activity the Committee would like to be understood as being ready and willing to cooperate with all other organizations of the bar in bringing to public attention the services which the legal profession is able to contribute to the common defense.

Planning for Annual Meeting of American Bar Association to be held in Indianapolis, September 29 - October 3

Left to right, sitting: Judges Curtis W. Shake, William Bridwell, Robert C. Baltzell, Dan C. Flanagan, Harvey Curtis and Edgar M. Blessing. Standing: A. J. Stevenson, Michael J. Fansler, Frank N. Richman, Curtis W. Roll, H. Nathan Swaim, Hubert DeVoss, Earl B. Barnes and Joe Rand Beckett. The latter two men are Indianapolis attorneys serving as chairmen of state-wide bar association committees. Mr. Beckett was host to the judges at his country home near Indianapolis.



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AMERICAN BAR ASSOCIATION JOVRNAL

RULES OF PROCEDURE IN CRIMINAL CASES

In another column we print the order of the Supreme Court entered February 3, 1941 in which it is announced that pursuant to the Act of June 29, 1940 the Court will assume the preparation of rules of pleading, practice and procedure in Criminal cases, and that to assist the Court in that undertaking an Advisory Committee has been appointed.

There is significance in the words "will assume the preparation of rules . . ." This is substantially the same language used by the Court in the order of June 13, 1935 appointing the Advisory Committee on Civil Procedure and those of us who know the careful attention given by the Chief Justice and the Associate Justices to the work of that committee, will translate those words in the light of what the same words in the earlier order are now shown to have meant.

Arthur T. Vanderbilt, Chairman of the new committee, a former President of the American Bar Association, is so well known for his leadership in movements for the improvement in the administration of justice as to leave no room for doubt as to the wisdom and energy with which he will guide and inspire the labors of his associates.

Professor James J. Robinson of the Indiana University Law School, Reporter to the committee, has long been a student of and participant in movements for the improvement of the administration of justice in the criminal courts.

Alexander Holtzoff, Secretary of the Advisory Committee, Special Assistant to the Attorney General of the United States, has for many years been the specialist of the Department of Justice in matters of judicial procedure. The other fourteen members of the committee are men of distinction and experience on the bench, at the bar and in the teaching branch of the profession.

The hundreds, and perhaps the thousands, of American Bar Association members who in every part of the land had the honor and the pleasure of working together on the Federal Rules of Civil Procedure welcome the members of the Advisory Committee on Procedure in Criminal Cases to their useful task, congratulate them on the honor bestowed upon them by the Court, and confidently predict the success of the new enterprise.

FURTHER AS TO IMPROVEMENTS IN ADMINISTRATIVE LAW

With the passage of the "lend-lease" bill (H.R. 1776), the indications are that the Congress will consider promptly the report and bills from the Attorney General's Committee on Administrative Procedure. In this issue the JOURNAL continues its presentation of informative material which will aid in the study of the report and bills, and will help our members in understanding the momentous issues involved and in forming a just opinion of their merits.

Shortly before our January issue went to press, the President vetoed the Walter-Logan Bill, which had been approved and actively supported by the Association. We published in that issue the veto message, with comment on it by the chairman of our Committee on Administrative Law (pages 52-54), and indicated that a later issue would give further analysis of its reasoning. We publish in this issue an exhaustive analysis of the veto message by Dean Roscoe Pound which has become available since our February issue appeared.

A few days before our February issue went to press, the voluminous report, bills, and accompanying "additional statements," came from the Attorney General's Committee. Although the time was short, a preliminary survey of the report and bills was prepared and given in that issue, along with an editorial statement of their great significance.

In a further effort to be informative, this issue contains the "summary" authorized by the whole committee and that of Messrs. McFarland, Stason and Vanderbilt; the full text of the challenging "separate statement" by Chief Justice Groner; a forthright comment by Col. O. R. McGuire, Chairman of the Association's Committee on Administrative Law; and a detailed analysis of the two bills submitted from the committee, which treats those bills in the light of the Walter-Logan Bill and other recommendations of the Association through its House of Delegates. The report of the Attorney General's Committee, and the accumulating material concerning it will be better reviewed, if it is read with the aid of the notable reports of the Association's Committee

on Administrative Law from 1933 to date. See particularly its 1937 report, ABA Annual Report pages 789 to 850 and its 1939 report, ABA Annual Report, pages 575 to 620. It is indeed gratifying to all those who, under the aegis of this Association, have worked so long and earnestly in this field, to find that substantially all of the conditions which have been repeatedly pointed out in these reports, as showing the great need for remedial legislation, are confirmed by the Attorney General's Committee without dissent; the disclosed divergencies of views are as to how far the curative legislation can and should go at this time. No one urges that the agencies and their procedures could safely be left as they have been and are.

The bill submitted by the majority of the Committee has been introduced and printed in the Senate as S. 675. The bill embodying also the more comprehensive provisions urged by Messers McFarland, Stason and Vanderbilt is S. 674. Both bills are before the Committee on the Judiciary, which has appointed a subcommittee to hold early hearings. The attitude and action of the Association will be decided by the House of Delegates, which fortunately meets in March. Meanwhile, every member of the Association should form his own opinions and make them known to the delegates from his State, to the end that the action of the House of Delegates may be the result of an enlightened and militant professional opinion.

Of the duty of every lawyer to interest himself intelligently and actively in these issues, there can be no doubt. The average lawyer familiarizes himself with the rules of practice and procedure in the courts, and from time to time gives at least some measure of support to efforts for their improvement, but fails to concern himself with the practices and procedures of the administrative agencies, which at present need such attention even more, and equally involve the essentials of freedom and justice under the law. It is high time for the lawyers, individually and through their Associations, to realize and remedy their own dereliction. No fair-minded lawyer would wish to destroy the agencies or impair the efficacy of their enforcement of the laws under which they operate; but "the rudiments of fair play" and the vitals of free, law-governed institutions are at stake in the pending bills, no less than in the efforts to improve the administration of justice in the courts. National defense is not merely the massing of men and the accumulation of materials against the contingencies of invasion by armed forces. National defense requires meanwhile the erecting and strengthening of every available bulwark against arbitrary power in governmental or private hands. Chief among those tasks is the early enactment of an adequate bill to make those improvements in administrative procedure pointed out in this notable report from a committee made up wholly of lawyers friendly to every proper purpose of the agencies. Reading of the thorough-going material and analyses which are published in this issue will demonstrate to every lawyer the need that he concern himself with these issues, actively and now.

THE SUMNERS BILL AS TO FEDERAL JUDGES

The distinguished chairman of the Committee on the Judiciary of the House of Representatives has introduced promptly in the new Congress his bill (H. R. 146) "To provide for trials of and judgments upon the issue of good behavior in the case of certain Federal judges." This is substantially the bill which was unanimously approved by each the Assembly and the House of Delegates, at the Annual Meeting of the Association last September, after Chairman Sumners had made a dramatic appearance and appeal before the Assembly.

Despite the absorption of public and legislative interest with other issues, time and opportunity should be found to consider and enact this important measure. Experience has demonstrated that no sufficient number of members of the Senate will listen to, or even read, the testimony in removal proceedings instituted by the House of Representatives as to Federal judges other than Justices of the Supreme Court. This is increasingly so under present and prospective conditions. The testimony as to misbehavior should be taken, and the appropriate findings made, in a judicial atmosphere and by experienced, impartial triers of facts.

This the Sumners bill provides, without relaxing any of the historic safeguards of judicial independence. The initiating of removal proceedings remains with the House of Representatives. The prosecution of charges is by the Attorney General, with the aid of such Members of the House as it designates. Three Circuit Judges designated by the Chief Justice shall constitute the trial Court, upon the issue of behavior other than "good" in the constitutional sense. From a judgment for removal, the accused judge is given a full right of appeal to the Supreme Court, on the law and the facts. Such a procedure would go far to assure a law-governed, impartial and impersonal determination of the vital issues.

THE PROPOSED REVISED STANDARD FIRE INSURANCE POLICY

The "Unconditional and Sole Ownership" Clause.

By George W. Goble

Professor of Law, University of Illinois, College of Law

A BILL proposing a revised fire insurance policy form is under consideration by the New York Legislature, and if passed, as seems likely, the form will be presented in the course of the next year or so to other states for adoption either by legislative enactment or departmental ruling. This new form has come as a result of over three years' study by a committee of the National Association of Insurance Commissioners headed by Louis H. Pink, Superintendent of Insurance of the State of New York.

There are now in general use in the country three fire policy forms, the old New York form drafted in 1886 and now used in about twenty-eight states, the new New York form drafted in 1917, and now used in fifteen or sixteen states and the Massachusetts form used in four states. The old New York form contains numerous harsh and unreasonable provisions as well as a number of outmoded and obsolete clauses. And yet the policy persists in general use in a majority of the states. The new New York form of 1917 is a material improvement over the old. Obsolescent and ambiguous provisions of the old policy are eliminated and its terms are more just and reasonable from the policyholder's point of view. But over twenty years' experience with the new New York form of 1917 has shown the need of further modification and refinement. The revised draft developed by Superintendent Pink and his committee is a worthy effort to bring about these needed changes.

Coverage Broadened

This new policy, from the standpoint of the insuring public, is a material improvement over any fire policy heretofore used. Its coverage clause, formerly including only fire and lightning, has been broadened to include loss from explosion, smudge and smoke; the exclusion of loss resulting from "riot or civil commotion" has been eliminated; increase of hazard does not avoid the policy unless it contributes to the loss; the keeping of gasoline and benzine, prohibited under present policies, is permitted up to one quart; other insurance, denied in present policies without endorsement, is permitted; time during which extensive repairs may be made on the insured property without avoiding the policy has been extended from 15 to 60 days; time during which the property may be vacant without the necessity of an endorsement, has been extended from 10 to 30 days.[1]

Sole Ownership Requirement Eliminated

But the most important changes in this new policy from the standpoint of the lawyer is that it eliminates the clauses that render the policy void; if the insured property be on land owned by the insured in fee simple; if with knowledge of the insured foreclosure proceedings be commenced against the property; if the property is encumbered by a chattel mortgage; and if the interest of the insured be other than "unconditional and sole ownership." These are all so-called moral hazard clauses. Statistics have shown that many outstanding policies are void and unenforceable because of innocent non-compliance with these various moral hazard conditions.

The most inequitable of these provisions is the "unconditional and sole ownership" clause. According to this clause if two or more persons own property as joint tenants, tenants by the entireties, or as tenants in common, and the property is insured in the name of one of them only, the policy is void not only as to the interest of the unnamed co-owner, but also as to the interest of the person named in the policy.

A typical situation to which the clause is applicable is this: A husband buys a residential property for a home. A deed in joint tenancy (or tenancy by the entireties, in some states) appeals to him because of its characteristic that upon the death of either himself or his wife the property will pass directly to the survivor, to the exclusion of children or other heirs. Consequently he has the deed made to himself and wife. Sometime later a fire insurance policy is applied for. The husband does not then recall that the property is held jointly, or, if he does, believes that fact to be unimportant in asking for insurance; and the agent does not inquire regarding the character of the applicant's ownership. So the policy is issued in the name of the husband alone. He accepts it, secure in the belief that protection against a destructive fire has been provided. But alas, for all his pains he has acquired only a worthless scrap of paper. The almost universal authority in the United States is that this so-called insurance policy is an absolute nullity.[2]

Two or three brothers or sisters inherit real property. One of them who is in the habit of taking care of the common business of the group takes out a fire policy in his own name on the ancestral property. The law calls the owners tenants in common, but one who

1. Journal of American Insurance. Dec. 1938, pp. 21-22. See also, *ibid.*, May, 1940, pp. 19 and 21.

2. Pollock v. Conn. Fire Ins. Co., 362 Ill. 313, 199 N. E. 816 (1936); Genesee Falls v. U. S. Fire Co., 16 App. Div. 587, 44 N. Y. Supp. 979 (4th Dep't 1897); Com. Mut. v. Crawford, 219 App. Div. 110, 219 N. Y. Supp. 103 (3d Dep't 1927); Alfred v. Bankers Ins. Co., 167 Tenn. 278, 68 S. W. (2d) 941 (1934); Palma v. Natl. Fire Ins. Co., 240 App. Div. 454, 270 N. Y. Supp. 503 (4th Dep't 1934); Lawson v. Twin City Fire Ins. Co., 2 F. Supp. 171 (E. D. Ky. 1932); Western Assur. Co. v. White, 171 Ark. 733, 296 S. W. 804 (1926); Schroedel v. Humboldt Ins. Co., 158 Pa. 459, 27 Atl. 1077 (1893); Palm v. National Ben Franklin Ins. Co., 43 Pa. Co. Ct. 689 (1915); Porobenski v. Amer. Alliance Ins. Co., 317 Pa. 410, 176 Atl. 205 (1935); Fullbright v. Phoenix Ins. Co. of Hartford, 329 Mo. 207, 44 S. W. (2d) 115 (1931); Jackson v. American Eagle Fire Ins. Co., 92 S. W. (2d) 374 (Tenn. 1936).

owns property as a tenant in common is not a "sole" owner; hence the "unconditional and sole" ownership clause is violated and the policy is void.[3]

In a cross-section study made in 1937, of 581 fire insurance policies on real property located in an Illinois community, approximately 25% of all such policies were found to be void, because of the violation of the "unconditional and sole" ownership clause; and of 255 policies on jointly owned real property, that were examined, over 50% were found to be void.[4] This is a startling fact, and should be cause for concern not only to people who buy fire insurance, but to companies who sell it. Therefore the elimination of this provision from the proposed revised form is a feature which should highly commend itself to the insuring public. But opposition by some insurance companies to this step has developed.[5] Their contention is reducible to three arguments:

1. Undisclosed co-ownership of property insured against fire creates a moral hazard, which the clause eliminates.
2. The fire insurance contract is personal in its nature, and the company is entitled to know to whom the policy grants protection. If the clause were deleted the company would be bound to unknown co-owners of the property.
3. The clause is available to the company as a defense on a policy when fraudulent incendiarism is suspected, but cannot be proved.

It is the belief of the writer that these arguments are untenable. They will be taken up seriatim.

Undisclosed Ownership as a Moral Hazard

(1) Does undisclosed co-ownership create a moral hazard? A moral hazard is a risk resulting from the creation of a temptation in the owner of the insured property to destroy it himself in order to realize upon his policy. Unrevealed co-ownership is said to create a moral hazard because the policyholder obtains a policy which gives him full protection on property in which he has only a limited or partial interest. He might, therefore, be tempted to destroy the property in order to recover for a full loss, and thereby make a profit. Or, so the argument goes, if the policyholder has only a partial interest in property fully covered by insurance, he might be tempted to exercise less than reasonable care to protect the property from fire, or to extinguish one, after it had started, since he has a chance to recover something of greater value than he runs the risk of losing by the fire.

But is there any basis for this conjecture in actual fact? In a case of husband and wife owning property jointly, for example, it is extremely unreasonable to assume that a husband would destroy his home in order to realize a larger amount of insurance than the value of his one-half interest. In the normal case he is as much interested in the preservation of his wife's interest as his own. Her loss is his loss. The same is true in only slightly less degree, where brothers and sisters or other relatives own property jointly. That the hazard is increased in any case, where jointly-owned property is insured in the name of one owner, is simply an assumption, with no data or scientific proof whatever to support it. There are no statistics showing a higher loss ratio in such situations, than where property is individually owned and insured. Neither do the figures show greater loss ratios among those having undisclosed limited interests in Massachusetts, Maine, New Hampshire or Minnesota where fire policies do not contain the "sole and unconditional ownership" clause, or in Wisconsin and South Carolina where it does not apply to the co-ownership of husband and wife. It would seem only fair to require the insurance companies to produce some proof of the existence of a moral hazard under such circumstances before permitting them to insert in their policies such a devastating clause.

But even if there were some moral hazard in such cases, are insurance companies justified in issuing such a large percentage of void policies to innocent people in order to catch an occasional policy-violating fraudulent fire setter? Is not the result too meager for the price? Since it is the law that one who wilfully burns his own property cannot recover his insurance, whatever the policy provisions are, the policyholder cannot profit by his wrong, in any event, if the facts are fully presented to the court. This would seem to be a more effective deterrent to the insured's incendiarism than any policy provisions could be.

Fire Policy as a Personal Contract

(2) The fire insurance policy, say the underwriters, is a personal contract between the company and the person named in the policy, and to require the company to pay an unknown and unnamed person would violate the principle that the company is entitled to know to whom it is granting protection. But this is a misconception. The elimination of the "unconditional and sole ownership" clause would not require the company to pay a loss to a person not named in the policy. It would require only that payment be made to the person named in the policy *in accordance with the extent of his interest in the property.* If, e.g., the person named in the policy were a co-owner with his wife, the company would be required to pay only the loss of such named person, which would not exceed one-half the total loss. The wife's one-half interest would not be covered by the policy. This is the view that has been taken in Massachusetts, where the fire policy used omits the "unconditional and sole ownership" clause.[6] It is hard to see what objection can be found to a rule requiring payment of a loss to a named insured in accordance with his interest in the property.

Sole Ownership Clause as a Defense Where Incendiarism Is Suspected

(3) The argument chiefly relied upon for the retention of the "unconditional and sole ownership" clause is that the violation of the clause makes available to the company a defense in those cases in which incendiarism by the insured is suspected but cannot be

3. Price v. Nat'l Union Fire Ins. Co., 294 Mich. 289, 293 N. W. 652 (1940); Guard Ins. Co. v. Gunn, 221 Ala. 654, 130 So. 180 (1930); Miller v. Great Amer. Ins. Co., 61 S. W. (2d) 205 (Mo. App. 1933); St. Paul Ins. Co. v. Culwell, 62 S. W. (2d) 100 (Tex. 1933); Hurley v. Girard Fire Ins. Co., 49 Ga. App. 823, 176 S. E. 785 (1934); Fireman's Fund Ins. Co. v. Cravey, 134 So. 232 (Fla. 1931); Citizens Ins. Co. of N. J. v. Railey, 256 Ky. 838, 77 S. W. (2d) 420 (1934); World Fire Ins. Co. v. Burgarosky, 176 Okla. 150, 54 P. (2d) 631 (1936); Bartz v. Eagle Point Mutual Fire Ins. Co., 218 Wis. 551, 260 N. W. 469 (1935); Evens v. Home Ins. Co., 82 S. W. (2d) 111 (Mo. 1935).

Contra: McNeil v. Conn. Fire Ins. Co., 24 F. (2d) 221 (D. C. Tenn. 1928).

4. Goble, The Moral Hazard Clauses of the Standard Fire Insurance Policy, 37 Col. L. Rev. 410 (1937). A part of the argument used above is taken from this article.

5. See the address of Arthur E. Benson. A. B. A. Rep. Section of Insurance Law. 1938, p. 278.

6. Ritson v. Atlas Assur. Co., 272 Mass. 73, 171 N. E. 448 (1930).

proved. This is justified, say the companies because of the difficulty of proving to the satisfaction of a jury the incendiary origin of a fire. If the policyholder burns his own house, the evidence of his crime is destroyed with it. But if this be sound doctrine, it is pertinent to ask why not insert a clause in the policy which would give a defense to the company in *all* cases where fraudulent fires are suspected but cannot be proved? Why limit such defense to cases where there is an undisclosed limited interest? In other words if it is just that the company should have a defense in the case of an undisclosed limited interest when it suspects, but cannot prove a fraudulent fire, it is just that it should likewise have that defense in the case of an unlimited interest if a fraudulent fire is suspected. But to my knowledge no policy has ever contained such a clause, and it is not likely that companies will hazard the criticism that would be directed toward them were they to insert such a clause.

To use the "unconditional and sole ownership" clause as a defense only when there is a suspicion of incendiarism and not in other cases when the clause is violated, is an admission of its perfidy. Difficulty of proof in other branches of the law does not dispense with the necessity of proof. The law does not send suspected persons to the penitentiary merely because proof of guilt is difficult. No more should it deprive innocent persons of insurance protection for which they have paid, without reasonable proof of their wrongful conduct. As the law now stands, the violation of this clause in effect creates an irrebuttable presumption that the policyholder whose property has been burned, has wilfully destroyed it. Even if he could prove by unimpeachable evidence that he was away from home on the date of the fire, and that his house was struck by lightning, still he could recover nothing. The court would not even hear his evidence. If the object of this clause is to prevent liability where the policyholder burns his own property, it is contrary to the spirit of the law to hold the policy void, if the policyholder is able to prove his innocence.

Sole Ownership Requirement Unfair and Destructive of Security

To the argument that this clause has the effect of rendering a large percentage of all issued policies void, the underwriters reply that they do not refuse to pay losses in every case in which this condition is violated. They only do so where they suspect the policyholder to be guilty of wilfully setting the fire, or of negligently failing to extinguish it after it has started. There are two answers to this contention. (1) Such a principle makes the insurance company a judge in its own case, and it is generally regarded as unfair to leave to one of the interested parties in a controversy the decision as to whether the other is guilty of such conduct as to constitute a forfeiture of his rights. (2) It makes the insurance policy a contract in which payment of a fire loss is purely optional with the company. That is, the company may pay for a loss or not as it pleases. This result destroys the essential element of insurance, viz., security. It makes no difference how honest or well intentioned a company may be, one purchasing a policy from it is entitled to an *enforceable obligation* that in the event of loss the company will pay. Honesty of intention cannot be accepted as a substitute for the sanction of the law in such a case. What would an insurance executive think of a bond offered to the company as an investment which contained no binding obligation to pay, but only made payment optional with the obligor? The statutes of no state would regard such a bond as a sound or permissible form of investment, for an insurance company. When one buys a fire insurance policy he is justified in assuming that he is obtaining the legal obligation of the company to pay for fire losses sustained. That is what he asks for, what he pays for, and in the absence of bad faith, what he is led to believe by the company that he is getting. The presence of the "unconditional and sole ownership" clause rather than relieving the company from a moral hazard actually places a moral hazard on the insured. Suppose over a given period a company finds its loss ratio running somewhat higher than anticipated, an "insured" under such a policy (even though he be quite innocent) is subject to the "moral hazard" that the company will find phantom excuses for not paying the loss, or at any rate that the adjuster will pare down the appraisal wherever possible. A protesting policyholder is likely to have the "unconditional and sole ownership" clause flashed into his face by the adjuster with the warning, "My dear man, we're not liable on this risk at all. Be careful what you say or you won't get a cent." Can one imagine a weapon in the hands of an insurance adjuster more dangerous to a policyholder?

Insurants Do Not Read Policies

Underwriters inquire, "Why don't people read their policies?" But average, ordinary people do not ordinarily read documents they cannot understand. Insurance policies are long, complicated, and technical. They are not often read by even lawyers, doctors, or business men. Is it reasonable to expect others to labor through them? People are accustomed to relying upon verbal statements and explanations made to them by the chosen agents of the companies, rather than upon the printed contents of complicated documents. Anyway, since the policies would not be understood even if read, nothing would be gained by the ceremony. It is not usually expedient to base the interpretation of a contract, as important to public welfare as insurance policies, upon the presumption that people read them when it is known they do not, or to charge them with knowledge of what it is known they do not know. The law should move in the direction of the average man's conception of what is reasonable and just.

No implication is intended by what has been said that moral hazards in insurance are unimportant. Though the amount is usually exaggerated by underwriters,[7] there is no doubt that a substantial percentage of the annual fire loss in the United States is caused by fraudulent fires, and every fair and reasonable means should be used to protect the companies from such losses. Ultimately these losses must be paid for by the innocent policyholders themselves in the form of increased premiums. But there is no warrant for the assumption that the "unconditional and sole ownership" clause has any causal relation to the fraudulent fire loss.

A desire on the part of fire insurance companies to have an easy way out when they have an unprovable suspicion of fraud does not justify the retention of a contract clause which renders 25% of all residential fire insurance policies void and unenforceable.

It is believed that the policy drafted by Superintendent Pink and his committee and now proposed for adoption in the state of New York represents a decided advance in the fire insurance contract form and it is recommended that it be accorded favorable consideration at the hands of the bar.

7. Hardy, Risk and Risk Bearing (1923) 292.

REVIEW OF RECENT SUPREME COURT DECISIONS

By Edgar Bronson Tolman*

Labor Law-Picketing—Freedom of Speech

Peaceful picketing is "the workingman's means of communication" to the public, of his side of a labor controversy. As such it is "protected by the bill of rights in order to avert force and violence due to restrictions on rational modes of communication but in a context of violence it may become part of an instrument of force not sheltered by the Constitution."

Milk Wagon Drivers Union v. Meadowmoor Dairies, 85 Adv. Op. 497, — Sup. Ct. Rep. —, U. S. Law Week 4185 (No. 1, decided Feb. 10, 1941).

Controversies arose in regard to the methods developed in and about Chicago between the producers, the dairy companies, the vendors, and retailers of milk. The meaning of those terms must be drawn from the analysis of the situation in *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U. S. 91, and from the careful statement of facts contained in this opinion. The controversy was marked throughout its course by force and violence. The union took action against the dairies and one of them, Meadowmoor Dairies, Inc., brought suit in an Illinois Court to stop interference with the distribution of its products. A preliminary injunction restraining all union conduct, violent and peaceful, was issued, and the case was referred to a Master for report. The Master found that besides peaceful picketing of the stores handling Meadowmoor's products there had been violence on a considerable scale, window smashing, substantial injury to the buildings of Meadowmoor and another dairy by explosive bombs, the use of stench bombs dropped in retail stores, trucks wrecked and burned, and a store set on fire, milk wagons held up, drivers threatened and injured, and a long continued and systematic resort to violence in an effort to compel dairies and stores to grant the terms of the union.

The Master recommended that all picketing and not merely violent acts should be enjoined. The trial court accepted his recommendation only as to acts of violence and permitted peaceful picketing. That ruling was reversed by the Supreme Court of Illinois and a permanent injunction as recommended by the Master was granted.

The action of the Supreme Court of Illinois was reviewed on certiorari and affirmed.

The opinion of the court was delivered by Mr. Justice Frankfurter. He defines the central issue of the case as follows:

> The question which thus emerges is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed.

The opinion begins the discussion of this question with the *Thornhill* case which recognized the constitutional protection of free speech on behalf of "publicizing, without annoyance or threat of any kind, the facts of a labor dispute." It was declared that "peaceful picketing is the workingman's means of communication." The limitation on that general statement, however, is set forth as follows:

> It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

The opinion refers in brief summary to the findings of the Master of the intimidation of customers and acts of violence on which the Supreme Court of Illinois justified its decision that picketing "in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises the picketing occurred and causing them to believe that non-compliance would possibly be followed by acts of an unlawful character."

As to the effect of the testimony, the Master's findings and the adjudication of the Supreme Court of Illinois, Mr. Justice Frankfurter says:

> It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence.
>
> The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. . . .
>
> These acts of violence are neither esoteric nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The

*Assisted by James L. Homire and Leland L. Tolman.

Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts.

We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club.

We are here concerned with power and not with the wisdom of its exercise.

We merely hold that in the circumstances of the record before us the injunction authorized by the supreme court of Illinois does not transgress its constitutional power. That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy.

MR. JUSTICE FRANKFURTER definitely states that the *Thornhill and Carlson* decisions are not qualified but that they are reaffirmed. He shows that in those cases the statutes there under examination baldly forbade all picketing near an employer's place of business and that there was no "entanglement with violence" there involved.

Attention is called to the use of the word "permanent" in the injunction sustained by the court but it is declared that the injunction is permanent "only for the temporary period for which it may last." That a familiar equity procedure exists for modifying when continuance is no longer warranted but that here again the state courts have the last say.

The opinion closes with the following final declaration:

Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources including the instrumentality of their courts, the power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government. that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution.

MR. JUSTICE BLACK filed a dissenting opinion. The opening sentence of his dissent is as follows:

In my belief the opinion just announced gives approval to an injunction which seriously infringes upon the constitutional rights of freedom of speech and the press. To such a result I cannot agree.

Drawing an analogy from man's physical body he says:

Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened. the result is debilitation; if it be stilled, the result is death.

He concedes as an essential to our federal system that the states should be left wholly free to govern within the ambit of its powers and that to shear them of power not denied to them by the federal Constitution would amount to judicial usurpation. But he declares that the court has committed itself to the doctrine that a state cannot through any agency, either wholly remove or partially whittle away the vital, individual freedom guaranteed by the First Amendment. He concludes that the injunction as directed by the Supreme Court of Illinois invades the constitutional guarantees of freedom of speech.

He closes his opinion with the following sentences:

Illinois, like all the other states of the Union, is part of a national democratic system the continued existence of which depends upon the right of free discussion of public affairs—a right whose denial to some leads in the direction of its eventual denial to all. I am of opinion that the court's injunction strikes directly at the heart of our government, and that deprivation of these essential liberties cannot be reconciled with the rights guaranteed to the people of this Nation by their Constitution.

MR. JUSTICE DOUGLAS joined in this dissent.

MR. JUSTICE REED also filed a dissenting opinion. His point of departure is shown in the opening sentence of his opinion.

My conclusion is that the injunction ordered by the Supreme Court of Illinois violates the constitutional rights of the Milk Wagon Drivers Union of Chicago, its officers and members. The Court reaches a contrary result on the ground that a state may "authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed." Since this controversy, by virtue of the Court's opinion, centers around picketing as a phase of free speech rather than around the more general topic of freedom of expression, I desire to state for myself the reasons which lead me to the conviction that the judgment should be reversed. A principle is thus involved, as well as a dispute over the scope of a court injunction.

He declares that the record shows "inexcusable acts of violence committed at least in part by members of the union"; that for such conduct the offenders are subject to punishment by the criminal laws of Illinois; and that the future conduct of "the rioters" is also subject to state control by injunction. The question which emerges is stated as follows:

Is the right to picket peacefully an employer's place of business lost for any period of future time by past acts of violence?

As to the principal basis of the prevailing opinion MR. JUSTICE REED says:

The Court now determines that where there is a background of violence, and inferentially, I think it must be admitted, that where there is a reasonable fear of violence, the freedom of speech which is secured to all persons by the First and Fourteenth Amendments to the Constitution may be withdrawn. It finds its justification in the authority of Illinois to "protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings." The momentum of fear from past violence, it is thought, would reach over into the peaceful picketing of the future. . . .

This authority of Illinois to protect its storekeepers must be exercised, however, within the framework of the Constitution.

As a state of the Union it is subject to the restraints of the Constitution. If the fear engendered by past misconduct coerces storekeepers during peaceful picketing, the remedy lies in the maintenance of order, not in denial of free speech. Constitutional guarantees against oppression are of value only when needed to challenge attacks.

MR. JUSTICE REED'S dissenting opinion closes with the following paragraph:

This Court has the solemn duty of determining when acts of legislation or decrees of courts infringe that

right guaranteed to all citizens. Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be of the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by jury. Nothing approaching this situation exists in this record and, in my judgment, the action of the Supreme Court of Illinois in prohibiting peaceful picketing violates the constitutional rights of these petitioners.

The case was argued by Mr. Abraham W. Brussell for petitioners; and by Mr. Donald N. Schaffer, and Mr. Roy Massena for respondent.

In No. 56 *A. F. of L., et al v. Swing, et al,* decided on the same day as No. 1, the *Meadowmoor Dairies* case, a beauty parlor had been picketed by a union in an effort to unionize the persons there employed. The proprietors of the beauty parlor brought suit for and obtained a preliminary injunction against picketing, and that injunction was dissolved by the trial court on motion. The Appellate Court of Illinois held the trial court was in error and the Illinois Supreme Court affirmed. The decision there was based upon the point that there was no dispute between the employer and his immediate employees, that the placards were libelous and that there were acts of violence. The Appellate Court then entered a permanent injunction which included not only acts of violence but also peaceful picketing. The judgment of the Appellate Court was affirmed by the Supreme Court of Illinois. The case was taken by the Supreme Court of the United States on writ of certiorari and the judgment of that court reversed.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The distinction between this case and the *Meadowmoor Dairies* case is stated as follows:

> All that we have before us, then, is an instance of "peaceful persuasion" disentangled from violence and free from "picketing *en masse* or otherwise conducted" so as to occasion "imminent and aggravated danger." *Thornhill v. Alabama,* 310 U. S. 88, 105. We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no "peaceful picketing or peaceful persuasion" in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> Such a ban of free communication is inconsistent with the guarantee of freedom of speech. . . .
>
> A state cannot exclude workingmen from peaceful exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concurred in the result.

MR. JUSTICE ROBERTS filed a dissenting opinion.

After stating the course of litigation through the courts and pertinent quotations from the opinion of the Supreme Court of Illinois, he based his dissent in part on the obscurity of the record, stating his view of the situation as follows:

> If the final decree was right on the ground stated by the Supreme Court in sustaining the temporary injunction; and if, under the Illinois practice, the affirmance of such a correct decree based on a previous opinion of the Supreme Court does not amount to the adoption of a preamble or recital of the decree, then we ought not to reverse the final decree of the Supreme Court.

The case was argued by Mr. Walter F. Dodd for petitioners; and by Mr. Myer N. Rosengard for respondents.

Interstate Commerce—The Fair Labor Standards Act—Regulation of Wages and Hours

The Fair Labor Standards Act of 1938 is within the constitutional powers of Congress to regulate Interstate Commerce. The shipment of goods produced for sale in other states than the state of their manufacture is interstate commerce. The prohibition of such shipments is a regulation of interstate commerce. Hammer v Dagenhart, 247 U. S. 251, is expressly overruled.

United States v. Darby Lumber Company, 85 Adv. Op. 395, 61 Sup. Ct. Rep. 451, U. S. Law Week 4170 (No. 82, decided Feb. 3, 1941).

This case presented two principal questions, first whether Congress has constitutional power to prohibit shipments in interstate commerce of products manufactured by employees whose wages are less than a prescribed minimum or whose hours of labor are greater than a prescribed maximum, and second, whether it has power to prohibit the employment of workmen in the production of goods for interstate commerce at other than prescribed wages and hours.

Appellee (Lumber Company) and others were indicted for alleged violation of the Fair Labor Standards Act. On demurrer the district court quashed the indictment on the broad ground that the act which it interpreted as a regulation of manufacture within the states is unconstitutional. Under a provision of the act a direct appeal was taken to the Supreme Court of the United States and the judgment of the district court was reversed.

The declared purpose of the act was to prevent the production of goods for interstate commerce under conditions detrimental to the maintenance of minimum standards of living, necessary for health and general well being, and to prevent the distribution of goods so produced, in competition with other goods in interstate commerce not so produced.

The purpose of the act is effected by setting up an administrative procedure, an administrator and Industry Committees appointed by him to ascertain and establish fair labor standards. The act makes it unlawful to violate the minimum wage and maximum hour requirements and imposes penalties for violation. The Lumber Company was charged in the indictment with acquiring raw materials which it manufactured into finished lumber and shipped in interstate commerce to customers outside the state and employing workmen in the production of that lumber at wages lower than the prescribed minimum wage and for more than the prescribed maximum hours per week.

The district court quashed the indictment on the broad ground that the act is unconstitutional being merely a regulation of manufacture; that manufacture is not interstate commerce and that the prescribed regulation of manufacture is not within the congressional power to regulate interstate commerce.

The opinion of the court was delivered by MR. JUSTICE STONE and as to the effect of the decision he says:

> The effect of the court's decision and judgment are thus to deny the power of Congress to prohibit shipment

in interstate commerce of lumber produced for interstate commerce under the proscribed substandard labor conditions of wages and hours, its power to penalize the employer for his failure to conform to the wage and hour provisions in the case of employees engaged in the production of lumber which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business and its power to compel him to keep records of hours of employment as required by the statute and the regulations of the administrator.

As to the distinction between manufacture and commerce he declares:

> While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." . . . It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. . . .
>
> The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution." . . . That power can neither be enlarged nor diminished by the exercise or non-exercise of state power.

The opinion cites and quotes briefly from the whole line of pertinent decisions in regard to the exercise of this power, and in answer to the contention of the Lumber Company that regulation of such scope and character constitutes invasion of state power, MR. JUSTICE STONE says:

> Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. . . .
>
> The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.

Summarizing the discussion of the cases cited in the opinion, MR. JUSTICE STONE declares:

> In the more than a century which has elapsed since the decision of *Gibbons v. Ogden* these principles of constitutional interpretation have been so long and repeatedly recognized by this Court, as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart*, 247 U. S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce.

Attention was called to the fact that *Hammer v. Dagenhart* has not been followed; that the thesis of the opinion has long since ceased to have force, and it was expressly overruled in the following language:

> The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Next was discussed the validity of the wage and hour requirements. Limitations of space do not permit a review of the painstaking and methodical examination of this question which the opinion discloses. It must for the present suffice to quote the following paragraph:

> Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.

Consideration was given to the contention that the fixing of minimum wages and maximum hours for labor employed in the production of goods intended for interstate commerce ran counter to the Fourth, Fifth and Fourteenth Amendments and it was held that the challenged provisions were not in conflict with those provisions of the Constitution. The opinion closes with the following significant paragraph:

> The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required.

The case was argued by Mr. Francis Biddle, Solicitor General, for appellant; and by Mr. Archibald B. Lovett for appellee.

Interstate Commerce—Fair Labor Standards Act—Review of Administrative Findings

The Fair Labor Standards Act is not an unconstitutional delegation of legislative power.

The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. The technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement to that effect.

Opp Cotton Mills v. Admr., Wage and Hour Division, Department of Labor, 85 Adv. Op. 407; 61 Sup. Ct. Rep. 524; U. S. Law Week 4174 (No. 330, decided February 3, 1941).

Opp Cotton Mills, an Alabama Corporation subject to the Labor Standards Act, was directed by the administrator of that act to pay a uniform 32½c per hour minimum wage and for other relief. It brought a proceeding in the Circuit Court of Appeals. That court sustained the order. The Cotton Mills Company sought and was allowed certiorari, but after hearing the arguments of counsel, the Supreme Court affirmed the order. The petitioner will be referred to as "Cotton Mills" and the respondent as "Administrator".

The opinion of the Court was delivered by MR. JUSTICE STONE.

The case involved the essential attack upon the constitutionality of the Fair Labor Standards Act which were raised in No. 82, *United States v. Darby Lumber Company* and it was therefore declared to be unnecessary to repeat the discussion of those questions.

Other points involved in the case attack the administrative procedure, findings, and orders which resulted in the final action of the administrator.

The constitutional question particular to this case as distinguished from the Darby Lumber Company case was whether the act is an unconstitutional delegation of the legislative power of Congress. The Court reviewed the history of the legislation and the substance of this feature of the attack upon the act and says:

> True, the appraisal of facts in the light of the declared policy and in conformity to prescribed legislative standards, and the inferences to be drawn by the administrative agency from the facts, so appraised, involve the exercise of judgment within the prescribed limits. But where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function.

It was declared that the Constitution did not require that Congress should find for itself every fact upon which it bases legislation; that Congress obviously could not perform its function if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy; that the Constitution is not to be interpreted as demanding the impossible or the impracticable; that the essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. In applying these principles to the act, MR. JUSTICE STONE says:

> The present statute satisfies those requirements. The basic facts to be ascertained administratively are whether the prescribed wage as applied to an industry will substantially curtail employment, and whether to attain the legislative end there is need for wage differentials applicable to classes in industry. The factors to be considered in arriving at these determinations, both those specified and "other relevant factors," are those which are relevant to or have a bearing on the statutory objective. The fact that Congress accepts the administrative judgment as to the relative weights to be given to these factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases, is no more an abandonment of the legislative function than when Congress accepts and acts legislatively upon the advice of experts as to social or economic conditions without reexamining for itself the data upon which that advice is based.

The procedure before the industry committee was assailed and the propriety of its action and that of the administrator was criticised. Several pages are devoted to a patient examination of all those detailed criticisms and no error was found therein. On the other hand, it was found that there was substantial evidence in support of the administrator's findings.

A special point was made by counsel for Cotton Mills that the kind of evidence in the record relied upon to support the findings was of that class which must be ignored because not competent in a court at law and in answer to that contention MR. JUSTICE STONE says:

> The argument of petitioner is not that the record contains no evidence supporting the findings but rather that this class of evidence must be ignored because not competent in a court of law. But it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed.

The opinion closes with the following statement:

> We have examined these contentions and, without further elaboration of the details of the evidence, we conclude that the Administrator's findings are supported by substantial evidence. Any different conclusion would require us to substitute our judgment of the weight of the evidence and the inferences to be drawn from it for that of the Administrator which the statute forbids.

The case was argued by Mr. Ben F. Cameron for petitioners, and by Mr. Solicitor General Biddle for respondent.

Labor Law—Jurisdictional Controversies Between Rival Unions—Criminal Prosecutions for Conspiracies to Employ Peaceful Picketing in Jurisdictional Controversies Between Rival Labor Unions

The employment of peaceful picketing by rival labor unions each of which claim that the employment of the other is an unfair labor practice, is not a criminal act under the Sherman Act, the Clayton Act, or the Norris-LaGuardia Act.

The United States v. Hutcheson, 85 Adv. Op. 422; 61 Sup. Ct. Rep. 463; U. S. Law Week 4151 (No. 43, decided February 3, 1941).

Two St. Louis breweries, both concededly engaged in interstate commerce, made contracts for the erection of additional facilities to their plants. A controversy had arisen between two different labor organizations, one a Carpenters Union, the other a Machinists Union, both affiliated with the American Federation of Labor, as to which one should have the work. Jobs in dispute were given to the Machinists Union and members of the Carpenters Union called a strike against both breweries, instituted a picket and displayed banners charging each brewery with being unfair to A. F. L. The members of the picketing union were indicted and charged with a criminal combination and conspiracy in violation of the Sherman law. Demurrers to the indictment were sustained and the case was taken to the Supreme Court. That Court affirmed the decision of the district court.

The opinion of the court was delivered by MR. JUSTICE FRANKFURTER and the opinion after stating the basic theory of the prosecution says:

> In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams v. United States*, 168 U. S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader pro-

ceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman Law but the related enactments which entered into the decision of the district court.

After a discussion of the Sherman Act, the Clayton Act, and the citation and analysis of numerous cases under each of the acts, MR. JUSTICE FRANKFURTER says:

> Were then the acts charged against the defendants prohibited or permitted by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States." So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Differentiating the distinction between controversies between employer and employee and between a rival labor organization, the opinion continues:

> Such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism and has undoubtedly been one of the potent forces in the modern development of industrial unions. These conflicts have intensified industrial tension but there is not the slightest warrant for saying that Congress has made § 20 inapplicable to trade union conduct resulting from them.

In the discussion of the Clayton Act and its applicability to the alleged defense and applying the principles of the Clayton Act to the facts set out in the indictment, MR. JUSTICE FRANKFURTER says:

> It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by § 20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by § 20 for "terminating any relation of employment," or "ceasing to perform any work or labor," or "recommending, advising, or persuading others by peaceful means so to do." The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working." Finally, the recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

From the foregoing it was deduced that the facts charged in the indictment constituted lawful conduct under the Clayton Act unless that act cannot be invoked because outsiders to the immediate dispute also share in the conduct. Cases were reviewed defining the term "participating or interested in a labor dispute" and the opinion continues:

> To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines.

As to the applicability of the Norris-LaGuardia Act to the Clayton Act, the opinion says:

> The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction.

This statement was supported by pertinent quotations from the report of the House Committee on the Judiciary, the legislative history and purpose of the Norris-LaGuardia Act and the analysis of cases construing it.

Closing the discussion MR. JUSTICE FRANKFURTER says:

> There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment are made lawful by the Clayton Act in so far as "any law of the United States" is concerned, it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress. Cf. *Apex Hosiery Co. v. Leader*, 310 U. S. 469. It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure.
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> *Affirmed.*

MR. JUSTICE MURPHY took no part in the disposition of this case.

MR. JUSTICE STONE filed a concurring opinion, the scope of which is made clear by his opening statement:

> As I think it clear that the indictment fails to charge an offense under the Sherman Act, as it has been interpreted and applied by this Court, I find no occasion to consider the impact of the Norris-LaGuardia Act on the definition of participants in a labor dispute in the Clayton Act, as construed by this Court in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443—an application of the Norris-LaGuardia Act which is not free from doubt and which some of my brethren sharply challenge.

He pointed out the two types of restraints under the Sherman Act. As to the first of these he says:

> It is plain that the first type of restraint is only that which is incidental to the conduct of a local strike and which results from closing the plant of a manufacturer or builder who ships his product in interstate commerce, or who procures his supplies from points outside the state. Such restraints, incident to such a strike, upon the interstate transportation of the products or supplies has been repeatedly held by this Court, without a dissenting voice, not to be within the reach of the Sherman Anti-Trust Act. There is here no allegation in the case of any of the employers of any interference, actual or intended, by strikers with goods moving or about to be shipped in interstate commerce such as was last term

so sharply presented and held not to be a violation of the Sherman Act in *Apex Hosiery Co. v. Leader*, 310 U. S. 469.

And as to the application of the Sherman Act and the argument put forward in its support he says, as to the second type of restraint upon interstate commerce charge by the so-called boycott and requesting members of the public not to purchase or use the Anheuser-Busch product he says:

> Were it necessary to a decision I should have thought that, since the strike against Anheuser-Busch was by its employees and there is no intimation that there is any strike against the distributors of the beer, that the strike was a labor dispute between employer and employees within the labor provisions of the Clayton Act as they were construed in *Duplex Printing Press Co. v. Deering, supra*. In that case § 20 of the Act, as the opinion of the Court points out, makes lawful the action of any person "ceasing to patronize . . . any party to such dispute" or "recommending, advising or persuading others by peaceful and lawful means so to do."

The concurring opinion ends with the following sentence:

> I can only conclude that, upon principles hitherto recognized and established by the decisions of this Court, the indictment charges no violation of the Sherman Act.

MR. JUSTICE ROBERTS delivered a dissenting opinion, in which the CHIEF JUSTICE joined.

He declares that "the indictment adequately charges a conspiracy to restrain trade and commerce" for the specific purpose of preventing the breweries from obtaining materials in interstate commerce intended for use in the construction of additional plants desired and preventing the contractors from obtaining articles in interstate commerce necessary for the construction of those plants and to hinder the flow of interstate commerce of the products of the breweries from Missouri to other states, and he asserts that the indictment undeniably charges a secondary boycott affecting interstate commerce.

As to the illegality of the secondary boycott he says:

> This court, and many state tribunals, over a long period of years, have held such a secondary boycott illegal. In 1908 this court held such a secondary boycott, instigated to enforce the demands of a labor union against an employer, was a violation of the Sherman Act and could be restrained at the suit of the employer. It is matter of history that labor unions insisted they were not within the purview of the Sherman Act but this court held to the contrary. As a result of continual agitation the Clayton Act was adopted. That Act, as amended, became effective October 15, 1914. Subsequently suits in equity were brought to restrain secondary boycotts similar to those involved in earlier cases. The contention was made that the Clayton Act exempted labor organizations from such suits. That contention was not sustained. Upon the fullest consideration, this court reached the conclusion that the provisions of Section 20 of the Clayton Act governed not the substantive rights of persons and organizations but merely regulated the practice according to which, and the conditions under which, equitable relief might be granted in suits of this character. . .
>
> This court also unanimously held that a conspiracy such as is charged in the instant case renders the conspirators liable to criminal prosecution by the United States under the anti-trust acts.

Passing to the Norris-LaGuardia Act, the dissenting opinion declares that labor continued to agitate for complete exemption from the provisions of anti-trust laws and shows that instead of granting that immunity Congress passed the Norris-LaGuardia Act. Of that Act MR. JUSTICE ROBERTS says:

> The title and the contents of that Act, as well as its legislative history, demonstrate beyond question that its purpose was to define and to limit the jurisdiction of federal courts sitting in equity. The Act broadens the scope of labor disputes as theretofore understood, that is, disputes between an employer and his employees with respect to wages, hours, and working conditions, and provides that before a federal court can enter an injunction to restrain illegal acts certain preliminary findings, based on evidence, must be made.

Passing a discussion of details he declares that; ". . . . a reading of the Act makes letter clear that the jurisdiction of action for damages authorized by the Sherman Act and of the criminal practice denounced by that Act, are not touched by the Norris-LaGuardia Act," and of that cause of reasoning he observes:

> By a process of construction never, as I think, heretofore indulged by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. . . I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do.

The dissenting opinion closes with these words:

> In the light of this history, to attribute to Congress an intent to repeal legislation which has had a definite and well understood scope and effect for decades past, by resurrecting a rejected construction of the Clayton Act and extending a policy strictly limited by the Congress itself in the Norris-LaGuardia Act, seems to me a usurpation by the courts of the function of the Congress not only novel but fraught, as well, with the most serious dangers to our constitutional system of division of powers.

The case was argued by Mr. Assistant Attorney General Arnold for appellant; and by Mr. Charles H. Tuttle for appellees.

Federal Statutes 28 U.S.C. 266—Scope of "Three Judge Courts."

The special procedure of a "Three Judge Court" is applicable only to proceedings for an interlocutory injunction restraining enforcement of a statute. It may not be resorted to for the restraint of the action of state officials.

Phillips, Governor, etc. v. U. S., 85 Adv. Op. 460; 61 Sup. Ct. Rep. 480; U. S. Law Week 4155 (No. 201, decided February 3, 1941).

The Grand River Dam Authority, an agency of the State of Oklahoma, was authorized to construct the Grand River Dam, and to borrow money and accept grants from the United States for the accomplishment of a program of flood control and hydro-electric development.

The United States allotted to that project $20,000,000 of which eight and one-half millions were to be used as a grant and eleven and one-half millions to be loaned to the Authority, payment to be secured by its bonds.

The construction began early in February of 1938 and by the spring of that year was nearing completion. The Governor of Oklahoma unsuccessfully pressed against the Authority claims for the flooding of roads and in 1940 declared martial law at and about the damsite and ordered the state Adjutant General to occupy

it. He also obtained an *ex parte* order in a state court restraining further work on the dam by the Authority.

Thereupon the United States began an action in a federal district court and a temporary order was issued against the Governor and other officials restraining interference with the project by further prosecution of the Governor's suit in the state court and by military force. A district court of three judges was convened because the suit was considered to be one within the scope of sec. 266 of the Judicial Code which required certain cases to be heard before three judges. An appeal was taken from that decree to the Supreme Court direct because of the provisions of Section 238 of the Judicial Code. The sole question here at issue was whether this case under the provisions of Section 266, Judicial Code, was one which must be tried by a three judge court under Section 266. If it was not there was no right of a direct appeal.

The decree of the district court was vacated on the ground that the case was not embraced in Section 266, not entitled to be tried by a three judge court or be taken to the Supreme Court by direct appeal. The decision did not pass on any of the merits of the controversy.

The opinion of the Court was delivered by MR. JUSTICE FRANKFURTER. As to the interpretation of Section 266, he says:

> By § 266, which is set forth in the margin, Congress provided an exceptional procedure for a well-understood type of controversy. The legislation was designed to secure the public interest in "a limited class of cases of special importance." *Ex parte Collins*, 277 U. S. 565, 567. It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of § 266 would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket.

As to the characteristics of a suit entitled to be heard by a three judge court, MR. JUSTICE FRANKFURTER says:

> To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an "administrative board or commission." The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.
>
> To the test of this principle must be put the argument that the present case is within § 266.

The Governor and state authorities justified interference with the activities of the state authority on the constitutional provision of Oklahoma, making the Governor "Commander-in-Chief of the Militia of the State" and on a state statute authorizing him to call out the National Guard in case of "any forcible obstructing of the execution of the laws or reasonable apprehension thereof."

The United States did not impugn the validity of those Oklahoma provisions but since the Governor's action was deemed a lawless interference with the Government's constitutional rights, the suit was claimed to be an application for an interlocutory injunction reenforcement of a state statute by restraining the action of any officer of the state." On this point MR. JUSTICE FRANKFURTER says:

> The claim proves too much. Probably most of the actions of governors trace back to the common provision charging them with taking care that the laws be faithfully executed. Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification.

Emphasizing the distinction between a challenge of the legality of the act of a Governor and the challenge of the validity of a state statute, MR. JUSTICE FRANKFURTER says:

> On its face, § 266 precludes a reading which would bring within its scope every suit to restrain the conduct of a state official whenever, in the ultimate reaches of litigation, some enactment may be said to authorize the questioned conduct. The special procedure only attends "the application for" an interlocutory injunction restraining enforcement of a statute. . . . No one questions Oklahoma's authority to give her Governor "Supreme Executive power" nor to make him Commander-in-Chief of her militia. What is here challenged is a single, unique exercise of these prerogatives of his office.

The case of *Sterling v. Constantine*, 287 U. S. 378, where martial law had been employed in support of an order of the Texas Railroad Commission limiting the production of oil in the East Texas field was declared to be a very different case, not applicable to this situation.

Since the matter before the Court is purely procedural and the real controversy undisposed of, an interesting practical question as to appropriate action in such circumstances was presented and in relation to that question the opinion concludes as follows:

> Had a timely appeal been taken to the circuit court of appeals the decree below could have been reviewed there, though rendered by three judges. . . . While this Court cannot hear the merits, it will, where the question of jurisdiction was not obviously settled by prior decisions, enforce the limitations of § 266 by an order framed to save appellants their proper remedies. . . . We therefore vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals.

The case was argued by Mr. John B. Dudley and Mr. Randall S. Cobb for appellants; and by Mr. Assistant Attorney General Shea for appellees.

Federal Statues—Sec. 35 Criminal Code the "Hot Oil" Act—Criminal Law—False Representations—Fraudulent Statements, Reports, Certificates, etc.

Section 35, Criminal Code, which contains broad general provisions for the punishment of false representations, re-

ports, etc. is not repealed or restricted because of the subsequent passage of the "Hot Oil" Act, which also prescribes penalties for false reports. The rule of ejusdem generis is applied as an aid to ascertaining the interest of the legislature, not to subvert it when ascertained.

U. S. v. Gilliland, 85 Adv. Op. 470, 61 Sup. Ct. Rep. 518, U. S. Law Week 4181 (No. 245, decided February 3, 1941).

Certain persons were indicted for offenses which by Section 35 of the Criminal Code were declared to constitute a crime. Among the acts so characterized were the following:

> . . . knowingly and willfully to "make or cause to be made any false or fraudulent statements or representations," or to "make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States."

There were eleven counts in the indictment, eight of them charged in substance that the defendants had willfully caused to be made and used, verified reports falsely and fraudulently stating the amount of petroleum produced from certain oil wells. The other two counts made a similar charge as to the amount of petroleum received from certain producers. On demurrer the first count was held good, but the district court held that the other ten did not state an offense under Section 35 of the Criminal Code. The Government appealed and the decision of the district court was reversed.

The opinion of the court was delivered by the CHIEF JUSTICE. He points out that the certificates referred to in the indictment were required by the so-called "Hot-Oil" Act; and therefore the alleged false and fraudulent reports pertained to the administration of an important federal Act; that Section 35 cannot be deemed to be invalid because of indefiniteness; that the affidavits and reports had been sufficiently described and the duty enjoined had been adequately defined; and that anyone presenting the required affidavits and reports to the board set up under the pertinent regulations was suitably charged with notice of the consequences of knowingly and wilfully including therein any false and fraudulent statements.

The defendant's contention is stated to be that the broad language of Section 35 should be restricted by construction so as to apply only to matters of a nature similar to those with which other provisions of Sec. 35 deal such as "claims against, rights to, or controversies about funds involved in 'operations of the Government' involving some governmental financial or proprietary interests." This contention was sought to be supported, by the doctrine *ejusdem generis*, by the construction given to Section 35 prior to the amendment of 1934 and by reference to the incongruity of the penalty prescribed for violation of Section 35 as contrasted with the penalty prescribed by the "Hot Oil" Act, to the enforcement of which the requirements in question were directed. Defendant also presented the contention that the passage of the "Hot Oil" Act was intended to cover the entire subject of the exclusion of hot oil from interstate commerce and consequently operated as a repeal of all other provisions dealing with that matter.

In regard to these contentions, the CHIEF JUSTICE says:

> Distinguishing that provision from Section 37, the conspiracy section of the Criminal Code which by its terms extended broadly to every conspiracy "to defraud the United States in any manner or for any purpose," this Court held that Section 35 which used the word "defrauding" in connection with "cheating and swindling" should be construed "as relating to the fraudulent causing of pecuniary or property loss" to the government. And that meaning was deemed to be emphasized by the context found in other provisions of Section 35.

Defendants had relied upon the effect of an amendment of Section 35 above referred to as supporting the construction of the statute for which they contended and on this point the CHIEF JUSTICE says:

> The amendment eliminated the words "cheating and swindling" and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits "in any matter within the jurisdiction of any department or agency of the United States." In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction.

As to the meaning of the term *ejusdem generis* the CHIEF JUSTICE says:

> The rule of *ejusdem generis* is a familiar and useful one in interpreting words by the association in which they are found, but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards. "The rule of 'ejusdem generis' is applied as an aid in ascertaining the intent of the legislature, not to subvert it when ascertained."

He declares that if there were any ambiguity in the language of the amended section the legislative history of the amendment would dispel any doubt as to the congressional purpose. That legislative history was reviewed and the CHIEF JUSTICE declares:

> In the light of the text of the Act of 1934, amending Section 35, and its legislative history, it is also clear that the fact that the penalty prescribed by Section 35 was greater than that fixed by the Act of February 22, 1935, has no significance in connection with the construction and application of the former. The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations.

The contention that the "Hot Oil" Act operated to repeal Section 35 of the Criminal Code so far as the latter is applied to false representations and the like in relation to "Hot Oil" is declared "singularly lacking in merit." It is pointed out that there were no express words of repeal and no repugnancy in the subject matter of the two statutes which would justify an implication of repeal and no indication of an intent to make the "Hot Oil" Act a substitute for any of the provisions in Section 35. The cause was therefore remanded to the district court for further proceedings in conformity with this opinion.

MR. JUSTICE MURPHY took no part in the consideration and decision of this case.

The case was argued by Mr. Herbert Wechsler for appellant; and by Mr. F. W. Fischer for appellees.

Bankruptcy—Railroad Reorganization Proceedings —Rejection of Lease—Effect on Obligations of Lessor

Upon the rejection of a lease of a railroad by the trustees in bankruptcy of the lessee, the latter are required to operate the property for the account of the lessor, under Section 77(c)(6), if the lessor is unable to operate the same.

In those circumstances the trustees in possession are not required to pay taxes and bond interest of a terminal company in which the lessor has an interest and whose bond interest and taxes the lessor is under obligation to pay by virtue of a state law. The Act of June 18, 1934, and Section 65 of the Judicial Code are not applicable to the trustees of the lessee operating the lessor's property under force of Section 77(c)(6) of the Bankruptcy Act.

Palmer v. Webster and Atlas National Bank, 85 Adv. Op. 436; 61 Sup. Ct. Rep. 542, U. S. Law Week, 4166 (No. 120, decided February 3, 1941).

This certiorari was granted to review a judgment of the Circuit Court of Appeals which had reversed the District Court of Connecticut in respect of an order directing the trustees in bankruptcy of the New Haven Railroad to cease advancing funds to pay taxes and bond interest of the Boston Terminal Company.

The New Haven, before its bankruptcy, was the lessee of the Old Colony's Railroad. The leased property included the lines and properties of the Boston and Providence Railroad. After the New Haven's bankruptcy its trustees rejected the lease of the Old Colony, which precipitated the latter's bankruptcy. The Old Colony then rejected the Boston and Providence lease, and that action, in turn, threw the Boston and Providence into bankruptcy.

By force of Section 77(c)(6) of the Bankruptcy Act, the New Haven trustees are operating the properties of both the lessors for the latters' account. The operations of both are at a deficit, and when the New Haven trustees determined that it was doubtful whether the value of the properties permitted any further advances to meet operating deficits, its trustees petitioned the District Court for instructions, resulting in the order directing them to withhold any further advances to meet the Boston Terminal taxes and interest.

On certiorari the ruling of the District Court was sustained, and that of the Circuit Court of Appeals reversed, in an opinion by MR. JUSTICE ROBERTS.

The opinion reviews the history of the Boston Terminal, which the various railroads serving Boston are required to use. There was no use of the terminal by the New Haven during the period in controversy. But the mortgage trustee of the Terminal Company asserted that the New Haven trustees are bound to pay the taxes and charges of the Terminal Company by reason of the Act of June 18, 1934, and also Section 65 of the Judicial Code.

The first of these Acts in substance requires that a trustee in bankruptcy shall be subject to all state and local taxes just as if the business were still being operated by the bankrupt. The other Act requires a receiver in possession of property by virtue of a federal court proceeding to operate the property in accordance with the valid laws of the state where the business is conducted.

The Supreme Court rejected these contentions and ruled that since the New Haven trustees were operating the properties under compulsion of Section 77(c)(6) of the Bankruptcy Act, merely to prevent serious public inconvenience, neither of the Acts relied on by the respondent is applicable.

As to the first statutory provision Mr. JUSTICE ROBERTS says:

> If the trustees of either of the lessor's properties were able to operate the lines of railroad and from the proceeds of that operation, or from any other source, were in possession of available funds, it would be the duty of the court in view of the Act of 1934 to require them to pay the taxes applicable to the business they are conducting under the orders of the court. But it does not follow that the New Haven trustees, who are not conducting the business of Old Colony or Boston and Providence, as such, but who, under the constraint of Section 77(c)(6), are merely operating the lines of those companies to prevent public inconvenience are, in the contemplation of the Act of 1934, conducting the business of the lessors in such sense as to be liable, out of New Haven estate funds, for taxes owed by those companies. It would require very clear and explicit language to evince an intent on the part of Congress to appropriate the moneys of the New Haven estate, which has rejected the Old Colony lease and rid itself of the leasehold interest thereby created, to pay the taxes of its lessor. We find in the Act of 1934 no such clear expression. On the contrary we think it plain Congress did not have in mind, in adopting that statute, any such situation as is created by Section 77(c)(6).

Rejecting the respondents' argument based on the other statute referred to, the opinion adds:

> Section 65 is not a new enactment. It has its origin in Section 2 of the Act of March 3, 1887 and it has frequently been interpreted and applied by the courts. Its obvious purpose was to negative the idea that a federal receiver or trustee could ignore the rules of law of the state of operation affecting the conduct of the business committed to his charge. In this sense it has been interpreted and applied and, in this sense, it is certainly binding upon the trustees of New Haven so long as they operate the property of the former lessors. The application of the Act by the court below goes much farther than this. If valid state laws require a debtor to pay his debts then, under the decision of the Court, such laws bind the New Haven trustees to pay the debts of Old Colony, and Boston and Providence. If this view were correct, the trustees would not be operating the property of those companies for the account of the latter as Section 77(c)(6) provides. On the contrary, they would be operating for the account of the New Haven estate. Moreover, on this assumption, the New Haven estate would be compelled to pay the former lessors' debts as they accrued. The result would be a preference of the creditors of the confessedly insolvent lessors as against the creditors of the New Haven whose trustees are operating the Boston and Providence and Old Colony property only under the constraint of Section 77(c)(6). We think that to state the proposition is to demonstrate that Section 65 of the Judicial Code has no such purpose or effect.

Nos. 242, 243, *Philadelphia Co. v. Dipple,* 85 Adv. Op. 442; 61 Sup. Ct. Rep. 538; U. S. Law Week, 4168, involves a problem similar to that in *Palmer v. Webster etc. Bank, supra.* Here the Pittsburgh Railways Company was in bankruptcy under Chapter X of the Bankruptcy Act. It had for many years operated some 55 street railways as a unified street railway system, under various leases and agreements, by virtue of which it agreed to pay operating and maintenance expenses and taxes.

After its bankruptcy trustees were appointed for the property. They have neither affirmed nor disaffirmed the leases and agreements with the underlying com-

panies, and there has been no segregation of the earnings and expenses of the underlying companies.

On a petition for instructions, an order was entered directing the trustees to pay the bulk of the taxes on the properties of the underlying companies. This the Circuit Court of Appeals reversed, and the latter's ruling was affirmed by the Supreme Court in an opinion by Mr. JUSTICE ROBERTS.

While certain distinctions are recognized here in contrast with the situation in *Palmer v. Webster etc. Bank, supra,* none was sufficient to bring about a different result with respect to the applicability of the Act of 1934. The opinion observes that the creditors are in position to demand an election by the trustees of the lessee company to either affirm or reject the respective leases.

Case No. 120 was argued by Mr. Herman J. Wells for the petitioners and by Mr. Robert H. Davison for respondent; and by Mr. Robert H. Hopkins for City of Boston as amicus curiae; and Nos. 243 and 242 were argued by Mr. W. A. Seifert for the petitioners and by Miss Anne X. Alpern and Mr. A. E. Kountz for the respondents.

Bankruptcy—Corporate Reorganizations—Jurisdiction of District Court over Claims for Compensation

Under Chapter X of the Chandler Act, the Bankruptcy Court has plenary power to review all fees and expenses in connection with a corporate reorganization thereunder, from whatever source they may be payable. But where a bondholder's committee and its counsel have an interest, in the equity in the bankrupts' assets, adverse to the bondholders, compensation for their services on behalf of the bondholders should be denied, because of the conflict of interest.

Woods v. City National Bank and Trust Company, 85 Adv. Op. 478; 61 Sup. Ct. Rep. 493, U. S. Law Week 4148 (No. 281 and 282, decided February 3, 1941).

The basic question in this case concerns the power of the District Court under Chapter X of the Chandler Act to disallow claims for compensation and reimbursement on the ground that the claimants served dual or conflicting interests. The proceeding involved the reorganization of an apartment hotel corporation. The claimants were the indenture trustee, the bondholders' committee and the committee's counsel. The committee's counsel acted also as counsel for the indenture trustee. Some of the committee members were officers or employees of an underwriter of first mortgage bonds. The underwriter was also heavily interested in the equity, but this interest was not disclosed in the solicitation of bondholders. Moreover, the underwriters were charged with misrepresentations in the sale of the bonds.

The claimants' claims for expenses and compensation were resisted by the bankruptcy trustee who also made a counter claim against the indenture trustee for misconduct and negligence. The District Court dismissed the claims for want of equity and allowed the counter claim only as a recoupment to extinguish any claims of the respondents.

The Circuit Court of Appeals reversed, finding no conspiracy to defraud or substantial evidence of mismanagement by the indenture trustee. It directed the District Court to allow out-of-pocket expenses and also reasonable compensation.

On certiorari this was reversed by the Supreme Court in an opinion by Mr. JUSTICE DOUGLAS. He points out that the Chandler Act vests in the District Court power to review all fees and expenses in corporate reorganizations, from whatever source that may be payable. But a claimant, representing members of the investing public, should be denied compensation where he has served conflicting interests. In this connection, Mr. JUSTICE DOUGLAS says:

> Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted. . . The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of the bankruptcy rules, is apposite here: "What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases.". . Furthermore, the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation.
>
> Protective committees, as well as indenture trustees, are fiduciaries. . . A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd.". .

The opinion warns that expenses also may be denied to one who has served conflicting interests.

The case was argued by Mr. Weightstill Woods for the petitioner, and by Mr. Vincent O'Brien for the respondents.

Federal Trade Commission Act—Jurisdiction of Commission

Under Section 5(a) of the Federal Trade Commission Act, the Commission is empowered to prevent persons from using unfair methods of competition in interstate commerce, but the power granted does not extend to unfair methods of selling carried out entirely within a single state.

Federal Trade Commission v. Bunte Bros., — Adv. Op. —; Sup. Ct. Rep. —; U. S. Law Week 4201 (decided February 17, 1941)

The opinion here considers the validity of an order of the Federal Trade Commission forbidding Bunte Brothers from selling its candies in "break and take" packages. The Commission found the use of "break and take" packages to be an unfair method of competition because the device makes the amount the purchaser receives dependent upon chance. Bunte Brothers manufacture candy in Illinois and the sales of its products are entirely within Illinois.

The Circuit Court of Appeals set aside the order and on certiorari the Supreme Court affirmed the judgment with an opinion by Mr. JUSTICE FRANKFURTER.

The Federal Trade Commission Act in Section 5(a) authorizes the Commission to prevent persons from using unfair methods of competition in interstate com-

merce. Decision of the case turns on whether the transactions here in question are in interstate commerce. In holding that they are not, the opinion emphasizes that the transactions do not fall within the words of the statute.

The court also alludes to the fact that for a quarter of a century the Commission has made no claim to jurisdiction such as is asserted here.

Mr. JUSTICE FRANKFURTER rejects an argument based on an analogy to the *Shreveport* doctrine in the regulatory field of interstate commerce committed to the Interstate Commerce Commission.

In conclusion, it is emphasized that the practical effect of the interpretation urged by the Commission is so far reaching that it ought not to be accepted without a clearer mandate from Congress. In this connection the opinion states:

> The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. Such control bears no resemblance to the strictly confined authority growing out of railroad rate discrimination. An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. The problem now before us is very different from that which was recently presented by *United States v. F. W. Darby Lumber Co.*, No. 82, decided February 3, 1941. We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act. This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read "unfair methods of competition in [interstate] commerce" as though it meant "unfair methods of competition in any way affecting interstate commerce," requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished.

A dissenting opinion was delivered by Mr. JUSTICE DOUGLAS, in which Mr. JUSTICE BLACK and Mr. JUSTICE REED joined. The dissenting opinion argues that the respondent is using unfair methods of competition *in* interstate commerce because the effect of its conduct is to burden, stifle or impair that commerce. It also relies upon the *Shreveport* doctrine, by analogy.

The case was argued by Mr. Hugh B. Cox for the petitioner, and by Mr. Theodore E. Rein for the respondent.

The Supreme Court on February 10, entered the following order in No. 28, *Sibbach v. Wilson & Company, Inc.*, involving the validity of Rule 35 FRCP:

> The opinion is amended by striking from the first sentence on page 7 the following words: "a litigant need not resort to the federal courts unless willing to comply with the rule, and that," and adding after the word "comply" the words "with its provisions." The petition for rehearing is denied.

Summaries

Criminal Law—Habeas Corpus—The Right of Accused to Counsel

Walker v. Johnston et al, 85 Adv. Op. 517, 61 Sup. Ct. Rep. —, U. S. Law Week 4192 (No. 173, decided Feb. 10, 1941).

An inmate of Alcatraz sought his discharge by habeas corpus on the ground that he was denied the assistance of counsel and that he did not file or authorize a plea of guilty.

Held in an opinion by MR. JUSTICE ROBERTS that the case was heard and disposed of on *ex parte* affidavits without the taking of testimony.

For irregularity of procedure in this respect the judgment was reversed and the case remanded to the district court for further proceeding in conformity with the opinion.

The case was argued by Mr. Charles E. Wyzanski, Jr., for petitioner; and by Mr. Herbert Wechsler for respondent.

Interest—Jurisdiction of Court of Claims to Award Interest Against the United States

United States v. Goltra, 85 Adv. Op. 450; 61 Sup. Ct. Rep. 487; U. S. Law Week 4157 (No. 191 and 192, decided February 3, 1941).

Appeal and cross-appeal from the Court of Claims. The controversy involved relates to damages for the taking, by the Government, of a fleet of tug boats, barges and facilities leased to Goltra. Jurisdiction was conferred on the Court of Claims by a private act and the question is whether the jurisdiction embraced power to allow interest on the amount of damages proved and allowed.

The claimants based their claim for interest on the ground that the private act conferred authority on the Court to render "just compensation" for the taking, arguing that "just compensation" includes interest.

The Supreme Court, in an opinion by Mr. JUSTICE REED, rejected this argument, and observed that while "just compensation" has been ruled to include interest in cases where the taking was by eminent domain, it does not include interest where the taking was tortious. Consequently, in the absence of more explicit terms, the Court of Claims had no jurisdiction to allow interest.

The CHIEF JUSTICE and Mr. JUSTICE BLACK did not participate.

The case was argued by Mr. Herman J. Galloway and Mr. Frederick W. P. Lorenzen for the claimants, and by Mr. Assistant Solicitor General Fahy for the Government.

Taxation—Federal Gift-Tax—Value of Assigned One-Premium Insurance Policy

Guggenheim v. Rasquin, 85 Adv. Op. 432; 61 Sup. Ct. Rep. 507, U. S. Law Week 4149 (No. 92, decided February 3, 1941).

United States v. Ryerson et al, 85 Adv. Op. 434; 61 Sup. Ct. Rep. 479; U. S. Law Week 4150 (No. 94, decided February 3, 1941).

Powers v. Commissioner of Internal Revenue, 85 Adv. Op. 435; 61 Sup. Ct. Rep. 509; U. S. Law Week 4151 (No. 486, decided February 3, 1941).

These three cases involve questions as to the value of single-premium life insurance policies under the Federal gift-tax, when irrevocably assigned as a gift.

In No. 92, the policies were purchased in December, 1934, at a cost of $852,438.50, payable in a single-premium covering policies on the assignor's life of $1,000,000 face amount. At substantially the time of purchase the petitioner assigned them irrevocably to her three children. Her gift-tax return listed policies at their cash-surrender value of $717,344.81. The Commissioner determined that "the value at the date

of the gift" was the cost of the policies. This ruling the Supreme Court sustained in an opinion by Mr. JUSTICE DOUGLAS. The opinion points out that the right to surrender the policies represented only one of the rights of the insured or beneficiary, and concludes that the cost of the policies assigned substantially simultaneously with their purchase is the proper measure of their value for purposes of the gift-tax.

In No. 494, a similar question is presented. There the policies were taken out in 1928 and 1929 but were assigned in 1934. The cost of the policies was less than their cash-surrender value at the dates of the gifts. However, the cost of replacing the policies at the then age of the insured would have been in excess of their cash-surrender. Under these circumstances, the Court concludes that cash-surrender reflects only a part of the value of the policies and rules that the cost of duplicating them at the time of the gifts is the acceptable criterion reflecting both their insurance and investment value, in the absence of more cogent evidence.

In No. 486, the question presented is similar to that in No. 92, and the Commissioner's ruling was sustained on the authority of the latter case.

The case was argued by Mr. John G. Jackson, Jr., for the petitioner and by Mr. J. Louis Monarch for the respondent in No. 92, and by Mr. J. Louis Monarch for the petitioner and by Mr. William N. Hadbad for the respondent in No. 494, and by Mr. Ralph G. Boyd for the petitioner and by Mr. J. Louis Monarch for the respondent in No. 486.

Taxation—Iowa Use Tax—Sustained as Applied to Mail Order Business

Nelson v. Sears, Roebuck & Co., (No. 255) — Adv. Op. —; — Sup. Ct. Rep. —; U. S. Law Week 4198.

Nelson v. Montgomery Ward & Co., Adv. Op. —; — Sup. Ct. Rep. —; U. S. Law Week 4201 (No. 256, decided February 17, 1941).

Certiorari to review a judgment of the Supreme Court of Iowa which held unconstitutional the Iowa Use Tax as applied in relation to the respondents' mail order business in Iowa.

The respondent conducts local stores in Iowa, to do which it is licensed as a foreign corporation. It pays state sales taxes on business done at the local stores.

The Use Tax is complementary to the Sales Tax, and is imposed on the use of tangible personal property at the rate of 2% of the purchase price. Retailers are required to collect the tax from the purchaser at the time of sale whether the sale is made within that state or without.

The respondent urged that the tax, as applied to its mail order business, violates both the commerce clause and due process.

The Supreme Court, reversing the Iowa Court, in an opinion by Mr. JUSTICE DOUGLAS, rejected both contentions and sustained the tax.

Mr. JUSTICE ROBERTS delivered a dissenting opinion, in which Mr. CHIEF JUSTICE HUGHES concurred. The dissent found the tax unconstitutional on both the grounds urged by the respondent.

Nelson v. Montgomery Ward, No. 256, sustained the same tax as applied to Montgomery Ward's mail order business, on substantially the same grounds.

The case was argued by Mr. John E. Mulroney for the petitioner, and by Mr. Joseph G. Gamble for the respondent in No. 255; and by Mr. John E. Mulroney for the petitioner and by Mr. Stuart S. Ball for the respondent in No. 256.

Full Faith and Credit—Effect of State Court Attachment of Federal Judgment

Huron Holding Corp. & Nat'l Surety Corp. v. Lincoln Mine Operating Co., 85 Adv. Op. 465; 61 Sup. Ct. Rep. 513; U. S. Law Week 4160 (No. 212, decided February 3, 1941).

Certiorari to review the action of a Federal District Court in Idaho which marked "satisfied" a judgment rendered by it in an action against the Huron Holding Company, on a showing by that company that the judgment had been attached and executed upon in an action in a New York court against the Lincoln Mine Co. The judgment creditor in the Idaho Federal proceeding. Attachment had been issued pursuant to New York law while the Federal Court judgment was pending on appeal in the CCA.

The opinion of the Court by MR. JUSTICE BLACK holds that the district court properly ordered its judgment to be marked "satisfied." It finds that under the New York decisions, the judgment of the Idaho court, even though on appeal, was sufficiently definite and final to bring it within the New York attachment statute and that under the Federal rule a judgment does not, unless and until reversed, lose any of its finality or decisiveness simply because an appeal is pending, even though by proper supersedeas, execution of the judgment may be stayed. It points out that both the Idaho Federal court and the New York state court decided matters within their respective authority and that to give effect to the New York attachment does not interfere with the jurisdiction of the Idaho court. It therefore concludes that the Idaho court should not issue an execution when the money was paid to Lincoln creditors by reason of a valid attachment proceeding, since such a step would constitute a denial of the full faith and credit which a federal Court must give to the acts of a state court.

The case was argued on January 13, 1941, by Mr. Leonard G. Bisco for petitioners, and submitted by Mr. D. Worth Clark and Mr. William H. Langroise for respondent.

Procedure—Liability of Government Controlled Corporation for Costs

RFC v. J. G. Menihan Corp., et al, 85 Adv. Op. 458; 61 Sup. Ct. Rep. 485; U. S. Law Week, 4180 (No. 200, decided February 3, 1941).

Certiorari to review a district court decision which denied an application for costs and additional allowance against the RFC in a suit which had been brought by the RFC for trademark violation.

The Court's opinion by MR. CHIEF JUSTICE HUGHES upholds the decision of the district court. It states that Rule 54(d) of the Rules of Civil Procedure providing that "costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law," is merely declaratory and effected no change of principle. It holds that the power to "sue and be sued" conferred on the corporation by the Congress includes the natural and appropriate incidents of

legal proceedings of which the payment of and allowances of costs in case of unsuccessful litigation is one, and that there is no evidence that Congress intended the corporation to be clothed with sovereign immunity to costs.

MR. JUSTICE BLACK did not participate.

The case was argued on January 10, 1941, by Mr. Clifford J. Durr for petitioner, and by Mr. Arthur E. Sutherland, Jr., for respondents.

Federal Income Taxation—Deductibility in Computing Net Income of Expenses of Taxpayers Personal Investment Activities

Higgins v. Commissioner of Internal Revenue, 85 Adv. Op. 475; 61 Sup. Ct. Rep. 475; U. S. Law Week 4159 (No. 253, decided February 3, 1941).

Certiorari to review a ruling of the Commissioner of Internal Revenue and the Board of Tax Appeals that the expense of personal investment activities of a taxpayer for ordinary and necessary expenses incurred by him in looking after his personal investments are deductible in computing net income under Section 23(a) of the Revenue Act of 1932 which permits such deduction of expenses paid or incurred in "carrying on any trade or business."

The Court's opinion by MR. JUSTICE REED holds that the conclusion of the Board of Tax Appeals that the evidence here fails to establish that the taxpayers activities were those of carrying on a business since the petitioner merely kept records and collected interest and dividends from his securities through managerial attention to his investments is adequately supported by the record and rests upon a conception of carrying on business that is similar to that applied in construing other sections of the Act. The taxpayer contended that the expenses for which he seeks deduction should be allowed since his activities in managing his estate, both realty and personality, are unified and the expenses, so far as the realty is concerned, are clearly allowable and cannot be severed from those relating to the personality. That contention is held not well taken since there is no reason why expenses cannot be apportioned and allocated to the part of the business to which they relate.

The case was argued on January 10th and 13th, 1941, by Mr. Selden Bacon for petitioner and by Mr. Arnold Raum for respondent.

Limitations of Actions—Suit by Receiver to Collect National Bank Shareholders Assessment

Rawlings, Receiver, v. Ray, 85 Adv. Op. 487; 61 Sup. Ct. Rep. 473; U. S. Law Week 4182 (No. 327, decided February 3, 1941).

Certiorari to determine whether an action by the receiver of an insolvent Arkansas National Bank to collect an assessment made by the Comptroller of the Currency against the Bank's shareholders, is barred by the Arkansas statute of limitations which provides that such an action must be commenced "within three years after the cause of action shall accrue." The action was commenced within three years after the date fixed by the Comptroller for payment, but after the prescribed period as measured from the date of the assessment.

The Court's opinion by MR. CHIEF JUSTICE HUGHES holds that the state statute is applicable, and that the period is to be measured from the date fixed for payment, since not until then was there a complete and present cause of action which the receiver could enforce by suit.

The case was argued on January 17, 1941, by Mr. George P. Barse for petitioner and submitted by Mr. Earl King for respondent.

Common Carriers—Delivery of Livestock—Jurisdiction of Interstate Commerce Commission

Armour and Company v. The Alton Railroad Company, 85 Adv. Op. 483; 61 Sup. Ct. Rep. 498; U. S. Law Week 4162 (No. 293, decided February 3, 1941).

Certiorari to review a judgment of the Circuit Court of Appeals affirming the District Courts' dismissal of the petitioners' complaint.

The question is whether the petitioner, a meat packer, is correct in its contention that, under the facts alleged, the railroads are under duty to deliver livestock at such a location and in such manner that the petitioner will have to pay no "yardage charge" to the Union Stock Yard and Transit Company.

For many years the custom has been for the railroads to deliver livestock through the Stockyards Company at Chicago. The latter is a common carrier, and its charges are fixed in part by the Interstate Commerce Commission and in part by the Secretary of Agriculture.

Upon a review of the allegations, the Supreme Court, in an opinion by Mr. JUSTICE BLACK, concluded that the controversy was one, in the first instance, for the exercise of the Interstate Commerce Commission's jurisdiction. The judgment was affirmed.

The case was argued by Mr. Paul E. Blanchard for the petitioner, and by Mr. Douglas F. Smith for the respondents.

Federal Procedure—Declaratory Judgment Act—Actual Controversy Defined

Maryland Casualty Co. v. Pacific Oil & Coal Co. & Joe Orteca, 85 Adv. Op. 455; 61 Sup. Ct. Rep. 510, U. S. Law Week, 4147 (No. 194, decided February 3, 1941).

Certiorari to review a holding by a lower Federal court dismissing an action by an insurance company against the insured and another for a declaration of non-liability. In that action it was alleged that under a conventional liability policy covering injuries to persons and property caused by automobiles hired by the insured, an action had been brought and was pending in the Ohio state courts against the insured to recover for injuries sustained in a collision between the plaintiff and a truck driven by an employee of the insured; that at the time of the collision the employee of the insured was driving a truck sold him by the insured on conditional sales contract; and that, therefore, there was no liability under the insurance contract since the truck was not one "hired by the insured."

The opinion of the Supreme Court by MR. JUSTICE MURPHY holds that the allegations in the complaint are sufficient to entitle plaintiff to the declaratory relief sought. It finds that the test of an actual controversy within the meaning of the Federal declaratory judgment act is whether the facts alleged, under all the circumstances, show that there is substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. It concludes that according to

this test there is an actual controversy between the parties to the action for declaratory relief.

MR. JUSTICE BLACK did not participate.

The case was argued on January 9, 1941, by Mr. Parker Fulton for petitioner.

Federal Jurisdiction and Procedure—Receiverships

Kelleam, et al v. Maryland Casualty Co. of Baltimore. — Adv. Op. —, — Sup. Ct. Rep. —, U. S. L. Wk. 4204. (No. 349, decided February 17, 1941).

Certiorari to review the action of a Federal district court in appointing a receiver and adjudicating a dispute between two conflicting groups of heirs to a decedent's estate, on petition of the surety of the administrator of the estate alleging that the original state probate decree had been obtained by fraud and seeking exoneration and the appointment of a receiver to preserve the estate pending the outcome of the dispute between the heirs. The validity of the original probate decree was, at the time of the institution of the Federal action, already the subject of a pending action between the two sets of heirs to set it aside for fraud.

The opinion of the Supreme Court by MR. JUSTICE DOUGLAS holds that the Federal action should have been dismissed. It points out that its primary purpose was to secure the appointment of a receiver to conserve the estate and impress upon it a lien for the surety's protection, and that in this aspect, the receivership was not a means to an end, but an end in itself and was therefore improper in the Federal practice, particularly since the property rights to be conserved were already being litigated by the state court. The opinion also holds that since the surety had no present claim to relief in the Federal court, that court had no jurisdiction to adjudicate the dispute between the two disputing groups of heirs, and, even if it had, it should not have exercised it when the question was already being determined by appropriate state court proceedings.

The case was argued on February 5, 1941, by Mr. Glenn O. Young for petitioners; by Mr. W. E. Green for Maryland Casualty Co. of Baltimore; and by Mr. Heber Finch for Mrs. Ethel Riddler, et al.

State Taxation—Power to Tax Income Derived from Property on Federal Reservation

Superior Bath House Co. v. Z. M. McCarroll, 85 Adv. Op. 447; 61 Sup. Ct. Rep. 503, U. S. Law Week 4164 (No. 180, decided February 3, 1941).

Certiorari to determine the applicability of the Arkansas 2% income tax on doing business in that state to an Arkansas corporation which leases from the United States and operates for profit a bath house on the Federal reservation at Hot Springs.

The Court's opinion by MR. JUSTICE BLACK holds that by virtue of the Act of 1891, in which the United States consented to taxation under Arkansas laws "applicable to the equal taxation of personal property in that state, as personal property of all structures and other property in private ownership" on the reservation, and the Arkansas act of cession of 1903, which reserved the right to tax under the 1891 Congressional Act, it had been agreed that no type of privately owned property should escape the state taxing power merely because it was owned, or used on the reservation; that this did not limit the authorized state taxes to direct ad valorem taxation of tangible property, and that the Arkansas corporation is therefore subject to the state tax.

MR. JUSTICE STONE delivered a separate concurring opinion in which he was joined by MR. JUSTICE ROBERTS. This opinion places its concurrence in the view that the Arkansas tax is applicable upon the ground that the power of the state to tax is unrestricted by Federal law, since the state has not surrendered its power to tax the income, and Congress has not assumed to prohibit the tax. In these circumstances it finds no reason to look for any expression of consent by the national government to enable a state to tax income of its own corporations from property located on the reservation.

MR. JUSTICE FRANKFURTER noted his agreement with both the majority and the concurring opinions.

The case was submitted on December 18, 1940, by Mr. Terrell Marshall for appellant and by Mr. Frank Pace, Jr., and Mr. Lester M. Ponder for appellee.

Due Process of Law—Right of Defendant in Criminal Case in State Court to Notice of Nature of Charge, to Counsel, Aid to Other Procedural Guarantees

Smith v. O'Grady. 85 Adv. Op. 666, — Sup. Ct. Rep. —, U. S. L. W. 4208. (No. 364, decided February 17, 1941.)

Certiorari to review the action of a Nebraska state court in refusing habeas corpus for release from prison sought on the ground that the prisoner was held pursuant to a Nebraska state court judgment rendered in violation of the rights guaranteed him by the 14th amendment to the Federal Constitution.

The opinion by MR. JUSTICE BLACK first examines the state's contention that under Nebraska law habeas corpus is not available to determine the asserted Federal rights and it concludes that the Nebraska law is not so clear on this point as to permit the conclusion that habeas corpus is not available.

The opinion then reviews the allegations of the petitioner purporting to show a deprivation of Federal rights. It finds that if these allegations can be proved by the prisoner they will invalidate the judgment upon which imprisonment rests, since they charge a denial of any real notice of the true nature of the charge, a plea of guilty to a charge punishable by twenty years to life imprisonment obtained by deception on the part of the state officials, a denial of a request for benefit and advice of counsel, and hasty confinement in the penitentiary, where the ignorance, confinement, and poverty of the prisoner prevented him from securing counsel in order to challenge the procedure by the regular processes of appeal. It concludes that these circumstances, if true, violate the procedural guarantees of the 14th amendment of the Federal Constitution.

The case was argued on January 17, 1941, by Mr. William L. Marbury, Jr., for petitioner and by Mr. Clarence S. Beck for respondent.

Federal Criminal Law and Procedure—Willful Use of Wrongfully Procured Passports—Evidence

Browder v. U. S.; Warszower v. U. S. — Adv. Op. —, — Sup. Ct. Rep. —, U. S. L. W., 4205 and 4206. (Nos. 287 and 338, decided February 17, 1941.)

Certiorari to review two judgments of conviction by the district court for willful use of a passport under

section 2 of the Passport Title of the Act of June 15, 1917, which provides for the criminal prosecution of anyone who either makes a false statement in an application for a passport or willfully and knowingly uses any passport the issuance of which was secured in any way by reason of any false statement.

The opinions in both cases were delivered by MR. JUSTICE REED.

In both cases it was urged as reason for reversal that the presentation of a wrongfully held passport to an immigration officer in the United States upon landing was not a "use" within the meaning of the statute.

As to this point the opinion in the *Browder* case (No. 287) points out that the crimes denounced by the statute are either the securing or the use of the passport by false statements in its procurement and concludes that a condemned use of a passport secured by a fraud is obviously within the Act. The opinion then examines the contention that the use proven was not intended to be within the scope of the statute since it was not a misuse of the privilege under international law of traveling through foreign countries. As to this, the opinion points out that under the act there is no limitation to the field of foreign travel and that reentry into the United States after foreign travel is so closely connected with that travel and so much a part of the ordinary incentive for securing passports that it falls within the purpose of the Act. The opinion then examines the contention that since the statute requires that the use be willful and knowing and since there was no evilness or dishonesty in the instant case, the conviction should be reversed. As to this, the opinion points out that the wording of the statute does not suggest that fraudulent use is the element of the crime and it observes that the word "willful" often denotes merely an intentional as distinguished from an accidental act.

In the *Warszower* case (No. 338) it was urged as an additional ground for reversal that the proof of presentation of the passport was insufficient to sustain the conviction. The opinion in this case reviews the evidence in detail and concludes that on this point the testimony as a whole justified the submission to the jury and its conclusion that petitioner actually used his passport to secure admission to this country. In this case it was further urged that the burden of the prosecution to prove that the passport was obtained by use of false statements had not been sustained since the evidence which it presented on this point consisted only of admissions to the contrary made by the defendant prior to his use of the passport and that such admissions required corroboration. As to this, the opinion concludes that the rule requiring corroboration of admissions was designed to protect the administration of the criminal law against convictions based on untrue confessions alone; that where, as here, the inconsistent statement was made prior to the crime, the danger does not exist; and that, therefore, such admissions do not need to be corroborated. It also finds that in this case there was other evidence of the falsity of the disputed statements in the application which justified submitting the question to the jury under appropriate instructions.

MR. JUSTICE MURPHY did not participate.

The cases were argued on January 16 and 17, 1941, by Mr. Carl S. Stern for Browder; and by Mr. Osmond K. Fraenkel for Warszower; and by Mr. John T. Cahill for the United States.

Federal Rules in Criminal Cases—Advisory Committee Appointed

ON the editorial page of this issue comment is made on action of the Supreme Court in connection with rules of procedure in criminal cases. The order of the Court undertaking that significant task and appointing an Advisory Committee to assist the Court is as follows:

It is ordered:

1. Pursuant to the Act of June 29, 1940 (Public, No. 675—76th Congress), the Court will undertake the preparation of rules of pleading, practice and procedure with respect to proceedings prior to and including verdict, or finding of guilty or not guilty, in criminal cases in district courts of the United States.

2. To assist the Court in this undertaking, the Court appoints the following Advisory Committee to serve without compensation:

Arthur T. Vanderbilt, Newark, New Jersey, Chairman.
James J. Robinson, Professor of Law at the Indiana University Law School, Reporter.
Alexander Holtzoff, Washington, D. C., Secretary.
Newman F. Baker, Professor of Law at the Northwestern University Law School.
George James Burke, Ann Arbor, Michigan.
John J. Burns, Boston, Massachusetts.
Frederick E. Crane, New York City.
Gordon Dean, Washington, D. C.
George H. Dession, Professor of Law at the Yale Law School.
Sheldon Glueck, Professor of Law at the Harvard Law School.
George Z. Medalie, New York City.
Lester B. Orfield, Professor of Law at the University of Nebraska Law School.
Murray Seasongood, Cincinnati, Ohio.
J. O. Seth, Santa Fe, New Mexico.
John B. Waite, Professor of Law at the University of Michigan Law School.
Herbert Wechsler, Professor of Law at the Columbia Law School.
G. Aaron Youngquist, Minneapolis, Minnesota.

3. It shall be the duty of the Advisory Committee, subject to the instructions of the Court, to prepare and submit to the court a draft of rules as above described.

4. During the recess of the Court the Chief Justice is authorized to fill any vacancy in the Advisory Committee which may occur through failure to accept appointment, resignation, or otherwise.

5. The Advisory Committee shall at all times be directly responsible to the Court. The Committee shall not incur expense or make any financial commitments except upon the approval of the Court as certified by the Chief Justice or upon his order during a recess of the Court.

February 3, 1941.

The committee will be given space for its office in the Supreme Court Building. It has already met and discussed a plan of operation and selected its office staff. It is planned to utilize facilities of the Administrative Office of the United States Courts as a Secretariat for the committee.

REPORT OF THE JUDICIAL CONFERENCE

By Chief Justice Charles E. Hughes

Special Session, January, 1941

A SPECIAL session of the Judicial Conference of Senior Circuit Judges was convened on January 21, 1941, and continued in session for two days. The following judges were present in response to the call of the Chief Justice:

Second Circuit, Senior Circuit Judge Learned Hand.
Third Circuit, Senior Circuit Judge John Biggs, Jr.
Fourth Circuit, Senior Circuit Judge John J. Parker.
Fifth Circuit, Senior Circuit Judge Rufus E. Foster.
Sixth Circuit, Senior Circuit Judge Xenophon Hicks.
Seventh Circuit, Senior Circuit Judge Evan A. Evans.
Eighth Circuit, Senior Circuit Judge Kimbrough Stone.
Tenth Circuit, Senior Circuit Judge Orie L. Phillips.
District of Columbia, Chief Justice D. Lawrence Groner.

The Senior Circuit Judges for the First and Ninth Circuits, Judges Calvert Magruder and Curtis D. Wilbur, were unable to attend and their places were taken respectively by Circuit Judges John C. Mahoney and William Denman. The Director of the Administrative Office of the United States Courts, the Assistant Director and members of their staff were present.

Report of the Attorney General's Committee on Bankruptcy Administration.—The meeting was called primarily to consider, at the request of the Attorney General, the report by a committee appointed by the Attorney General on the administration of the Bankruptcy Act. Assistant Attorney General, Francis M. Shea, chairman, and Charles A. Horsky, director, of that committee, were present with members of the committee's staff at the opening of the session. Mr. Shea explained the committee's proposals. The Conference also heard Mr. B. Loring Young, the president of the National Association of Referees in Bankruptcy, in relation to the committee's recommendations.

Copies of the committee's report had previously been distributed to the members of the Conference and they proceeded to the consideration of its recommendations as set forth in Part III of the report, pages 117-120. These recommendations appear in full in the appendix to the present report.

The Conference approved without modification the recommendations made by the committee with respect to the creation of a Division of Bankruptcy in the Administrative Office, as follows:

I. There should be set up, in the Administrative Office of the United States Courts, a Division of Bankruptcy, headed by a Chief, to be appointed by the Director of the Administrative Office.

A. The Division, in addition to the Chief, should include a staff of assistants adequate to enable the Chief and the Director to carry out the functions listed below. It should also include a few expert, highly qualified attorneys who can assist in special problems of research and investigation.

II. The Division of Bankruptcy, and the Chief, should assist the Director in carrying out the following functions:

A. The periodic and frequent examination and audit of the affairs of the referees and other bankruptcy officials.

B. The collection of bankruptcy statistics in such form as will best reflect the actual conditions of bankruptcy and bankruptcy administration throughout the United States.

C. The immediate and continuing investigation of the rules and practices of bankruptcy administration, with the object of discovering the most satisfactory rules of procedure under the various conditions which exist throughout the United States.

D. The receipt and investigation of complaints and suggestions with respect to bankruptcy administration and bankruptcy officials.

The Conference resolved that the statement of the function described in recommendation II E of the committee's summary should be modified so as to read as follows:

II. E. The recommending to the Conference of Senior Circuit Judges changes in the Bankruptcy Act, changes in the general orders and official forms, and changes in local bankruptcy rules, practice and procedure; and the recommending to the Circuit Council of a Circuit any changes with respect to local rules, particular practices and procedures in any court or before any referee in bankruptcy in that Circuit.

With respect to the committee's recommendations II F, III B, III B 1 and 2, and III C 2 and 3, relating to the inauguration and maintenance of a system of full time salaried referees in bankruptcy, the Conference adopted the following resolution:

Resolved, That it is the sense of the Conference that the fee system for the pay of referees in bankruptcy should be abolished and a system of full time referees at fixed salaries, as recommended by the Attorney General's committee, should be adopted for the country at large in so far as such system may be justified by local conditions; further, that a nation wide survey should be conducted by the Director of the Administrative Office with view of determining whether or not such system is practicable in all districts and areas of the country and if not, to what extent it should be supplemented by part time referees on a salary basis; and further, that both with respect to full time referees and with respect to such part time salaried referees as may be found necessary, the Conference should be authorized, upon the recommendation of the Director, to determine the number of referees, the territory over which each shall exercise jurisdiction, the salaries they shall receive, and any changes which may be made with respect to these matters:

Now, therefore, with respect to recommendations II F, III B, III B 1 and 2, and III C 2 and 3 of the report of the Attorney General's committee, the Conference makes the following recommendations:

1. That the legislation to be enacted authorize this Conference to determine whether part time salaried referees are necessary in any district or area of the country in lieu of the full time referees proposed in the report;

2. That the Director be authorized by such legislation to conduct a nation wide survey with a view of determining the number of full time salaried referees and, if the appointment of part time salaried referees is recommended, the number of such part time salaried referees, together with the territory to be served by each in either case, and the salaries to be paid them, and to report the result of his findings to this Conference and to the various Circuit Councils of the circuits for which such referees are to be ap-

pointed, and such Councils shall make recommendations to this Conference with regard thereto;

3. That this Conference be vested with authority to determine, in the light of the recommendations of the Director and of the Circuit Councils, the exact number of referees to be appointed, the territory over which they shall exercise jurisdiction, the salaries they shall receive, and any changes which may be made thereafter as to their respective numbers, territories or salaries;

4. That the transfers provided in III B 2 of the committee's report should be by direction of the Circuit Council for such periods as it may designate.

With respect to the appointment of referees, the Conference resolved that the proposal in recommendation III A of the committees report should be modified so as to read as follows:

III. A. The power of selection and appointment of referees is to remain in the district judges. Section 34 should be clarified, however, to make it clear that in districts with more than one judge (including judges appointed for more than one district, or in situations in which the territorial jurisdiction of the referee extends over more than one judicial district, appointments shall be by joint action of a majority of such judges, or by the Circuit Council in case no such majority exists.

The Conference approved the committee's recommendation III D that referees shall be appointed for a term of six years. The Conference resolved, however, that the proposals contained in recommendations III D 1 and 2, relating to the removal and reappointment of referees, should be modified so as to read as follows:

III. D. 1. Removal of a referee during the term for which he is appointed shall be only for incompetency, misconduct, inefficiency, or neglect of duty. Incompetency, misconduct, inefficiency, or neglect of duty by a referee coming to the knowledge of the Director shall be reported by him to the district judge or judges of the district or area for which such referee is appointed and to the Circuit Council. A referee may be removed for any one or more of the above mentioned causes by the district judge or judges of the district or area for which he was appointed. When a report of incompetency, misconduct, inefficiency, or neglect of duty by a referee is made to such judge or judges and he or they fail to remove such referee, the Circuit Council, if it deems proper, may remove him from office for any one or more of the above mentioned causes.

Before any order of removal shall be entered, a specification of the charges shall be furnished to the referee and he shall be given reasonable notice of the time and place fixed for the hearing thereof and shall be accorded an opportunity to be heard on the charges.

III. D. 2. Not later than 90 days before the end of the term of each referee, the Director shall report in writing to the judge or judges of the district or area for which the referee was appointed, recommending his reappointment or recommending against reappointment because of incompetency, misconduct, inefficiency, or neglect of duty on the part of the referee. In the event the Director shall recommend against reappointment, the referee shall not be reappointed without the approval of the Circuit Council.

The Conference resolved that the proposal contained in the committee's recommendation III C 4 with respect to the retirement of referees should be modified so as to read as follows:

III. C. 4. In case of incapacity or at the age of seventy after ten years of service as a referee, the referee may retire or be retired by the judge or judges of the district or area for which he was appointed and receive annually thereafter during his life an amount equal to one-half of his salary in the year immediately preceding his retirement. Such benefits are to be paid by the United States.

The Conference adopted the following resolution in regard to aged referees.

Resolved, That the Conference recommends to the committee that it consider the advisability of making some provision for aged referees of long service who may be displaced as a result of the passage of the act.

The committee's recommendations III C 1 and III E, relating to the salaries and expenses of referees, were approved without modification. These recommendations are as follows:

III. C. 1. The salaries shall be paid by the United States from funds derived from charges against bankrupt estates, collected by the clerks of the district courts and paid into the United States Treasury, the system remaining self-supporting as it is today.

III. E. The expenses of each referee's office are to be paid by the United States, but from funds derived from charges against bankrupt estates, collected by the clerks of the district courts, and paid into the United States Treasury, the system remaining self-supporting as it is today. Such expenses are to be under the supervision of the Director and the Chief.

In connection with its proposal that salaries and expenses of referees be paid from a fund derived from charges against bankrupt estates (III C 1 and III E, above), the report, at pages 153 to 155, contains estimates of the probable future amounts of such charges. In arriving at such estimates, the committee included the sum of $200,000 as the approximate amount of charges arising because of the appointment of referees to act as special masters in proceedings under Chapters IX, X and XII of the Bankruptcy Act. With respect to this item, the Conference adopted the following resolution:

Resolved, That it is the sense of the Conference that the allowances amounting to $200,000 mentioned as special masters' fees in the recapitulation on page 155 of the committee's report should no longer be made; that the deficiency so resulting should be met by an addition of about two-thirds to the present amount of the "Graduated Fixed Charge on Asset Cases"; and that when a referee is appointed as special master under Chapters IX, X or XII no allowance shall be made to him as special master.

Estimates.—The Director submitted to the Conference an estimate of the appropriation necessary for the establishment and maintenance of a Division of Bankruptcy in the Administrative Office for the fiscal year 1942. The estimate was based upon the committee's proposals regarding the functions and size of such a division, and contemplates a total appropriation of $39,193.31 to provide for the salaries of a chief, assistant chief, two other attorneys, a secretary and two stenographers; the addition to the Division of Procedural Studies and Statistics of a senior clerk and two statistical clerks; traveling expenses, and other miscellaneous expenses. The Conference approved this estimate.

With respect to examiners necessary to conduct the investigations contemplated by the committee's recommendations, the Conference adopted the following resolution:

Resolved, That the Conference directs the Director to cooperate with the Attorney General and use his best efforts to secure in the appropriation for examiners for the Department of Justice for the fiscal year 1942 a force sufficient to supply competent examiners for the examination of the bankruptcy offices of the district courts under the supervision of the Adminis-

trative Office in accordance with recommendation II A of the Attorney General's Committee on Bankruptcy Administration (pages 127 and 128 of the report of the committee). This action is without prejudice to such action as the Conference may hereafter deem advisable to provide for a corps of examiners under the Administrative Office of the United States Courts at any time in the future.

At its October (1940) session and in connection with its consideration of estimates submitted by the Director for the fiscal year 1942, the Conference approved certain provisos in the proposed form for that portion of the 1942 appropriation act dealing with "Miscellaneous Salaries, United States Courts." It has now resolved that the first of those provisos, appearing on page 10 of the report of the October session, should be amended by striking out the words "circuit and" in the second line so that, as amended, it shall read as follows:

> Provided, That the compensation of secretaries and law clerks of district judges shall be fixed by the Director of the Administrative Office of the United States Courts in accordance with the compensation schedules of the Classification Act of 1923 (as amended), judges' secretaries being classified in the senior clerical grade and law clerks in the principal subprofessional grade.

Proposed Legislation.—The Director submitted to the Conference drafts of bills prepared in accordance with the recommendations of the Conference at its October (1940) session. These drafts were approved, with certain modifications, and the Director was instructed to support such bills before the Congress. In addition, the Conference recommended the enactment of a bill "To amend section 531 of the Revised Statutes, as amended, to divide Kentucky into two judicial districts," proposed by Judge Hicks in order to carry out a plan adopted at a conference of district judges, clerks and United States attorneys of Kentucky for changing the time and places of holding district courts in that state.

The Conference also recommended an amendment to section 306 of the Judicial Code to empower the circuit councils to subpoena witnesses and compel the production of testimony. When so amended, section 306 would read as follows (new matter being in italics and matter omitted in brackets):

> 306. To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside. The senior judge shall submit to the council the quarterly reports of the Director required to be filed by the provisions of section 304, clause (2) and *upon the information so furnished and that gathered from other sources by the council* such action shall be taken [thereon] by the council as may be necessary *to effectuate the purposes of this section. For such purposes and for any other purpose within its competency, the council shall have the power to subpoena witnesses and to make orders for the production of evidence before it, and it shall have the powers of a district court of the United States to punish disobedience of such orders and subpoenas.* It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. Nothing contained in this section shall affect the provisions of existing law relating to the assignment of district judges to serve outside of the districts for which they, respectively, were appointed.

Courthouses in the District of Columbia.—At its October (1940) session the Conference adopted a resolution relating to the erection of a new courthouse for the District Court of the United States for the District of Columbia. The Conference has now resolved to rescind that resolution and has instructed the Director to take such steps as may be practicable to accomplish the early erection of such a courthouse, subject to the approval of the Chief Justice of the United States Court of Appeals for the District of Columbia.

Cases Decided by Inferior Courts in Conflict with a Later Decision of the Supreme Court.—A committee consisting of Judges Parker, Learned Hand and Phillips was appointed to consider legislation with respect to the review or rehearing within a limited time of cases decided by inferior courts in conflict with a later decision of the Supreme Court.

Civil Service Status for Employees of Clerks' Offices.—The Conference instructed the Director to investigate and report at the next session on the advisability of bringing deputy clerks and other persons employed in offices of clerks under a civil service system.

Instead of adjourning, the Conference declared a recess subject to the call of the Chief Justice.

For the Judicial Conference,

CHARLES E. HUGHES,
Chief Justice.

January 28, 1941.

Appendix to Report

THE recommendations made by the Attorney General's committee, as stated in its summary at pages 117-120 of its report, to which reference is made in the report of the Judicial Conference, are as follows:

I. There should be set up, in the Administrative Office of the United States Courts, a Division of Bankruptcy, headed by a Chief, to be appointed by the Director of the Administrative Office.

A. The Division, in addition to the Chief, should include a staff of assistants adequate to enable the Chief and the Director to carry out the functions listed below. It should also include a few expert, highly qualified attorneys who can assist in special problems of research and investigation.

II. The Division of Bankruptcy, and the Chief, should assist the Director in carrying out the following functions:

A. The periodic and frequent examination and audit of the affairs of the referees and other bankruptcy officials.

B. The collection of bankruptcy statistics in such form as will best reflect the actual conditions of bankruptcy and bankruptcy administration throughout the United States.

C. The immediate and continuing investigation of the rules and practices of bankruptcy administration, with the object of discovering the most satisfactory rules of procedure under the various conditions which exist throughout the United States.

D. The receipt and investigation of complaints and suggestions with respect to bankruptcy administration and bankruptcy officials.

E. The recommending to Congress of changes in the Bankruptcy Act, to the Supreme Court of changes in the General Orders and Official forms, to the district courts of changes in local bankruptcy rules and to any referee or other bankruptcy official of changes in practice and procedure. In connection with this function, the Director should be empowered, if his recommendations as to

changes in the local rules are not accepted by the district judges, or his recommendations as to practice and procedure are not accepted by the referee or other official or corrected by the district judges, to request, if he sees fit, that such recommendations be approved and made effective, or rejected, by the Circuit Court Judicial Council of that circuit.

F. The inauguration and maintenance of a system of full-time salaried referees, and the supervision and maintenance of their offices.

III. The system referred to in II F, *supra*, should be constituted and maintained as follows:

A. The power of selection and appointment of referees is to remain in the district judges. Section 34 should be clarified, however, to make it clear that in districts with more than one judge, or in situations in which the territorial jurisdiction of the referee extends over more than one judicial district, appointments shall be by joint action of a majority of such judges (or by the senior district judge in case no majority exists) unless the majority, by rule or standing order, shall otherwise provide.

B. The number of referees is to be substantially reduced, and each of them is to be put upon a full-time basis.

1. The exact number of referees and the territory over which each shall exercise jurisdiction are to be determined by the Director after a careful study of conditions throughout the country as a whole, and of local conditions such as the area, the population, the transportation and communication facilities, the type and amount of bankruptcy work in prior years and where it is centered, the existing personnel and the over-all amount of funds available for salaries.

2. The number of referees and their respective territories may be changed from time to time, and referees may be transferred from one area to another within the same judicial circuit, as changes in these conditions warrant, subject, however, to the limitations contained in III D, *infra*.

C. Each referee is to be paid a stated salary in an amount between the limits of $3,000 and $10,000 a year.

1. The salaries shall be paid by the United States from funds derived from charges against bankrupt estates, collected by the clerks of the district courts and paid into the United States Treasury, the system remaining self-supporting as it is today.

2. The salary of each referee is to be determined by the Director upon consideration of, among other factors, the average number and the types of cases closed and pending and the average amount of gross assets realized for the preceding five-year period in the territory over which the referee is to have jurisdiction.

3. The salary of a referee may be changed as changes in conditions warrant, but a salary shall not be reduced during the tenure of any referee below that at which he was originally appointed, nor reduced during any term below that which it was at the beginning of that term, and shall not be changed more often than once every two years.

4. In case of incapacity or at the age of seventy after ten years' service as referee, the referee may retire and receive annually thereafter during his life an amount equal to one-half of his salary in the year immediately preceding his retirement. Such benefits are to be paid by the United States.

D. The term for which referees are to be appointed is to be six years.

(Here follows provisions for the procedure to be followed in case of disability or removal of referees.)

Province M. Pogue

PROVINCE M. POGUE died December 26, 1940, at his home in Cincinnati. He was born at Maysville, Kentucky, October 14, 1865, and was descended from Colonel Robert Pogue who came from Ireland to Virginia about 1720. He graduated from Washington & Jefferson College and from Cincinnati Law School. He was admitted to the Ohio Bar in 1889 and to the Bar of the Supreme Court of the United States in 1907. He began his long and active professional career in Cincinnati, Ohio, in 1890, where he practiced for a full half century. He was a member of the United States Chamber of Commerce, the Cincinnati Chamber of Commerce, and was active in alumni matters for both Washington and Jefferson College and Cincinnati University. He gave freely of his time and talents to many civic organizations.

Mr. Pogue was a member of the American Bar Association, and was prominent in many of its activities. He served on its Committee on Commerce from 1921 to 1925 and was Chairman from 1925 to 1927; on its Executive Committee from 1927 to 1930; a member of its Committee on Jurisprudence and Law Reform and Chairman, 1937-38; member of the Local Council from Ohio from 1919 to 1923. He was also active in the Ohio State Bar Association of which he was President 1925-26; and in the Cincinnati Bar Association of which he was President from 1920 to 1922.

He was a life member of the American Law Institute.

THE LAW STUDENT 1941

By Leon Green
Dean, Law School, Northwestern University

THE progress of the American law school and of legal education is measured by the degree to which law students have been permitted to participate in their own professional training. In no other field of formal education has the student come from so far behind and taken a place so far out in front. In no other school does he earn such heavy responsibilities, mature so rapidly, or play so dominant a part. The story in its fullness would require too great detail; a sketchy outline will serve the purpose here.

The early American lawyer got his law by "reading law" in the office of some practitioner for whom he did the chores of the office. He grew up in the office, in the courts and in the profession. Whatever the level of his legal maturity may have been—and for some the level was high—he was a tough textured product. The process was slow, none too difficult, and not very broadening. It went along well, however, with the leisurely tempo of early American legal practice. But, as lawyers became pressed by their clients and as they became organized into firms, they had less time for students; students also as the law of a new nation developed required more time for study; and as the demand for more and better trained young lawyers grew, law schools were set up here and there by judges and by members of the bar who could spare the time from active practice.

Early American Law Schools

These early law schools were simple affairs—a room perhaps in the lawyer's home, a few seats for the students and a chair for the teacher. But it was not the equipment that made the school. It was the fact that the law student came under disciplined instruction. He listened to lectures and to recitals of the experiences of his instructor, read such textbooks and treatises as were available, and "stood" examinations. The number of lawyers who gave instruction increased. With the increase in teachers the number of law books grew. Nearly all the early and highly respected texts and treatises on American law were written by these teachers—Kent, Story, Wilson, Gould, Parsons, Greenleaf, Minor and many others. New subjects were constantly being developed, faculties grew from one to two, three, and even four teachers, the processes of teaching expanded, and the exactions placed on the student increased. For many years the scheme remained essentially the same. The student heard the lectures of eminent judges and lawyers; he read texts; he remembered as much of both as possible; he sometimes took part in mock trials. These were the limits of his participation. When he came to the bar his head was chock-full of law, but he had little of the tough fibre of the law office apprentices who were still coming to the bar. The law-schooled man knew more law and was better educated generally, still he had to spend his "years of starvation" while he learned the practice and grew into a full-fledged lawyer.

Some of these early schools became attached to and later were integrated within colleges and universities, and out of them have grown many of the great schools of today. This academic absorption did not work any immediate change in the educational process. The "text and lecture method" continued to even higher levels of refinement. It gave little life to the study of law. It was too much teacher and too little student; all authority and no skepticism. The rugged reality of the law office had been lost in the shuffle. The study of law was tottering toward legal scholasticism.

Langdell's Casebook

Then came Langdell to the Harvard Law School with his casebook, and before it had been fully exploited there had followed in its wake an interminable train of developments which changed the whole face of legal education. The casebook presented every type of puzzling problem and conflicting view. At first it was baffling to students and teacher alike. Casebooks multiplied and became widely used long before they were wholeheartedly accepted. Many of the best lecturers mistook their use and undertook to weave out of the cases the same beautiful patterns of legal theory to which they had long been accustomed, but in the skeptical eyes of the students who were inclined to read the cases these lectures seldom hung together for more than a season. Other professors required their students to read the cases, master their facts, analyze the legal propositions involved and participate in class discussions. This was an exacting exercise and at first students tended to rebel against it; they preferred to listen to the professor.

But without much delay the better students sensed the fun to come and the lid from Pandora's box was off. As professors questioned the statements and the interpretations of students, students in turn learned to question the statements and interpretations of professors. The class-room became the scene of daily battle between teacher and student; the battle-front was inevitably extended into the corridors and into the professor's office. The professor's theories were under constant attack and any flaws were gleefully searched out and made known. Here the challenge was real. Bluff was quickly called. The undergraduate turned professional. False modesty, indifference, sneers for the fellow student who dared speak up, had no place. Advantage was not so unequal. If the teacher could look up more cases and read treatises and spin good arguments, so could the student. And it will be remembered that by this time law books had increased from a few hundred volumes to thousands and tens of thousands of volumes. Authority gave way to industry and resourcefulness on the part of both teacher and student. Teaching came to require much of the vigor and art of the court room. Young lawyers, eager for the tilt and burning for controversy, were attracted to the professor's chair. These young teachers were a challenge to student combativeness and were shown little mercy. Many did not survive. Those who did have transformed law teaching from a restful profession for retired lawyers into a profession requiring men as fit and as eager for action as their brothers who do the business of office and courthouse—teachers with masterly techniques for dealing with cases—teachers

who have sought to explore the unknown behind the cases.

The Student Law Review

Along with this transformation of the law school student and his teacher and in part as explanation of them, came another great product of the casebook—the law review. The student had been given a taste of action through the introduction of the casebook. Action had developed power to dig into cases and write notes and comments on his own account. He was impatient for a wider and more exacting forum than that provided by the classroom. The young teacher also was impatient —too impatient to wait until he could write a text or treatise as his predecessor had done. The impulse to write an article expounding some important phase of the law that the treatise-writer had ignored or had treated inadequately was too urgent. The law review was the answer to the common prayer of student and teacher. Once law reviews were launched they multiplied rapidly and controversies quickly raged over the whole field of the law.

Scope of Law Study Expanded

As already suggested, the casebook gave the law student the opportunities required for his development. It continues to open the way for him. No other device gives such range and such maturity of thought. Through it he is encouraged to go the limit of his abilities in the classroom. Its problems, multiplied by the professor's reading and imagination follow him outside and dog him and his fellows wherever they may be. The casebook sends the student to the library for more cases and texts and statutes. Its offspring, the law review, sends him there and beyond, into the libraries of all literature. The law review opens to the student every corner of the social order. It answers his craving for marketing his critical as well as creative production. Through his monthly notes and comments he can seize upon new legislation, recent opinions of the courts, administrative reports, the publications of scholars in all related fields, and bring judge, legislator, administrator and scholar all under the light of his own budding scholarship. He can enlist others in his cause and at the end of the school year give the profession an imposing volume which mirrors with high accuracy the progress of the law.

The law review had more explosive in it than any one had dreamed. As its researches and commentaries were extended, the students found themselves in control of the most exciting and vital activity about the school — an activity with an influence reaching into the law offices, the courts, and even into the judges' chambers. But let us stick to the campus, for there the review has done its best work. It was in the school that under the monthly impact of its critical writings a very sobering—to many a very saddening fact—became apparent—the fact that the casebook had serious limitations; that it had not met and could not meet all the demands of a law school curriculum; that it had already extended the two-year curriculum to three years and was seriously threatening a fourth. It was the law review that called for a college student stronger and better prepared if he were to measure up to law review standards. It was the law review that disclosed the depths beneath the cases, their economic and social implications, institutional defects, folklore disguised as fundamental principle, and thus created the demand of students that these depths be explored and materials and techniques provided for their study. And it was the obvious superiority of law review training that called for a registration so limited that all students, or at least all those who desired, could have a hand in the most enjoyable, the most exacting and the most valuable work about the school.

In response to the call for a strong diet of teaching materials faculties produced new types of casebooks, revised old ones, divided and recast subject matter, rethought legal education, introduced scientific methods, developed new schools of legal philosophy, did everything that faculties could be expected to do. But their new materials and revisions were out of date almost before they were printed; their fresh thinking, scientific methods, and new philosophies were quickly exploited and absorbed. Pressures from new subjects and more masterful students increased instead of diminished. Faculties grew—faculties recruited in large part from the students who had run the law reviews, young teachers anxious to extend the field of legal study into realms considered closed to lawyers. As teachers they held fast their passions for exploration, publication, experimentation. But how could they escape from the casebook—the casebook that opens such new worlds for the law student but holds him prisoner if he attempts to go beyond? How could the demands created by the law review be met by the slow processes of the instrumentality which had brought them into existence?

Curriculum Choked

Some one had a happy thought. Stencils and typists were provided for the fertile-minded and energetic professors. Mimeographed tomes became the burden of every student. Some developed into printed editions; others were superseded by a succession of mimeographed editions. The legislatures and the courts, responsive to the advances made by numerous technologies and the emergencies created by a long depression, began to produce an amazing volume of materials upsetting nearly everything the schools were teaching. The mimeographs grinding out their weekly reams were constantly in arrears. Law schools were pressed as they had never been in all their history. But this merely meant again more courses than anyone could study in three years. The courts and legislatures and mimeographs had again choked the curriculum, and instead of giving students and their law reviews relief had put upon them even heavier burdens. The mimeograph had made it possible to reach further afield, broaden the curriculum and keep it fresh but it did not remove the limitations of casebook study. Students keen for the pleasure of active participation in the processes of their own professional training, students bored by the increasing pressure of formal classes and more and more case materials, were demanding relief. The better the students the more insistent they were that the casebook barrier be broken. A way out was imperative.

Curriculum Reorganized

Strange things took place—natural as viewed in retrospect, fearful as the steps were being taken. The casebook was not thrown away; the law review was not given up; the mimeograph was not discarded. The scope of legal study was not reduced; its expansion could not be stopped. Relief came from other directions. First, overgrown classes in the more important courses were reduced to teachable size. This meant greater opportunity for the individual student. Second, subjects of lesser and diminishing importance, as well as subjects of narrow areas with their well channelled doctrines were covered by short series of lectures supported by texts. This gave the student the

opportunity to grasp the essentials of many subjects without excessive inroads upon his time. Third, and of great importance, many basic kindred courses were rolled together in a single major course manned by several teachers. This conserved the student's time and integrated his study over broader fields. It also stimulated teachers to integrate their own knowledge over broader fields and permitted them to work in closer accord than did separate courses taught independently. Fourth, the major subjects were restricted as far as possible to first and second year casebook courses so as to permit freer choice of subjects and more independent work by the student in his third year. Finally, the more pressing and rapidly developing subjects were assigned to seminars and group studies in the third year.

This arrangement did much to relieve the student from the pressures of an over-crowded curriculum. And while it called for more teaching man-power and consequently placed heavier burdens upon the professors, at the same time it allowed a better distribution of the teacher's time. It also relieved the strain on instruction budgets, for universities cannot provide teachers enough if every subject is to be given a formal class room hour. Nor can they ask a limited teaching staff to exhaust its energies in classroom performances. But they can ask that professors be in their offices with the same regularity required of practitioners, ready to be consulted by their student clients.

Freedom for Creative Work

This remaking of the curriculum gave to the advanced student the freedom he most needed for his law review and creative work. He cannot undertake the study of every problem a teacher may assign. A division of labor is required in educational effort as elsewhere. Even fresh materials made possible by the mimeograph must be provided with severe restraint.* If so many cases and so much material are provided that they will not be read, the teaching process is defeated. When worthwhile problems in a field are plentiful it is better for the student to write a comment on some significant phase of a subject requiring extended investigation and careful discrimination. He can then have his comment mimeographed and distributed, and be prepared to meet the attacks made upon it by other students who are working upon other phases of the same problem or cluster of problems. In the process of his own investigation he becomes equipped to attack what they in turn prepare.

Integration of Efforts

Moreover, not one faculty member alone but all those supervising studies in closely related fields are available for office consultation and can participate in the group discussions. Kindred problems are no longer made strangers by the sharp cleavages indicated by names of courses. The student quickly senses the endless ramifications of legal doctrine, the elusiveness of material facts, the rainbows of ultimate issues, the makeshift reasons which parade under the guise of public policy. He consults a professor who after long discussion leaves him in doubt, another who increases the doubt, a third who cites him to an article written by the professor on another phase of the subject. About ready to quit he reluctantly claims the assistance of the review editors who stalk the seminars with covetous eyes for anything publishable. They know the feeling. They have been through it all. They take their brother in hand and with the patience of saints painfully help him create out of what he has garnered from the four winds something that sounds to him at least like John Marshall himself—something fit for publication.

In some such fashion do the processes of modern legal training produce young lawyers and their law reviews. And in some such fashion do these processes extend downward from teachers to editors, to those struggling to become editors into the student body at large so that students find themselves their own best teachers. And in some such fashion have law students come to share so largely in the processes of legal education in the law school of today. For truly it can be said that today it is not the faculty, or the library, or the curriculum, or the school organization which provides the core of law school, nor all of these combined. Instead, it is the student. Around him and his activities are built all of these things.

Student Bars

Nor is this the whole story. Students having discovered that they can publish law reviews, induce their teachers to work together, compel changes in curricula, necessitate the strengthening of faculties, and make the study of law through their own teaching a living thing, have not stopped with becoming active participants in the educational processes. They have sought to influence their environments in numerous other ways. They have campaigned for adequate buildings, libraries, living quarters, student offices, for convenient schedules, and for scholarship aids until they have gotten them. Moreover, there is no detail about the school beneath the dignity of their petition if they think it worth while. Such activities have necessarily led to organization. Student bar associations are no longer uncommon, and to them go the responsibility of all student activities about a school.

Schools which have been so fortunate as to have student organizations keyed to the administration know how valuable they are. Aside from all the things they campaign for, they give tone to the school and dignity to the individual student. Gone are the days of discipline problems for the faculty; the students take care of them better. Gone are the headaches in the administrative office caused by dilatory grading of papers and countless arbitrary measures taken thoughtlessly by the professors. The students are too persuasive; the professor can not ignore them as he can where student organization does not exist. Gone too is the bumptious student who capitalized so heavily on his ability to keep a school in turmoil. Student organization leaves no place for him. Self-provided and wholesome entertainment designed to break the strain of too fast a pace; genuine comradeship developed through fighting a common cause; the truest professional spirit of give and take refined by daily clashes with fellows and faculty; students as solicitious for their school's welfare as are the dean or the president of the university—these are some of the values which have come with the growth of the law student to full stature.

*As an example of what may call for reproduction are the following which fell under my eye in a single day: John W. Davis' splendid address, "The Argument of an Appeal," December, American Bar Association Journal; United States v. Appalachian Electric Power Co., 61 Sup. Ct. 291 (extension of national control over waterways); Wisconsin v. J. C. Penney Co., 61 Sup. Ct. Rep. 246 (tax on dividends of out-of-state corporations doing business in Wisconsin); the President's veto of the Walter-Logan Bill. There doubtless were other materials appearing the same week which I did not see. But the point is that constantly the demand is greater than can be given recognition.

BOOK REVIEWS

REPORT on the Royal Commission on Dominion-Provincial Relations. 1940. Ottawa: The King's Printer. 3 vols., pp. 261, 295, 219. Also, 8 volumes of appendices, and 21 other supporting volumes.—In the midst of the life and death struggle of the embattled British Commonwealth of Nations, Canada has completed a report on the problems of Canadian federalism so far-reaching in importance as doubtless to transcend the difficulties of the war-time situation and to point a direction for the future. Appointed in August, 1937, the Royal Commission on Dominion-Provincial Relations, popularly known as the Rowell, the Sirois, or the Rowell-Sirois Commission after the names of its chairmen, was given the somewhat Herculean task of investigating the relations between the Dominion and the provinces, or, in other words, "the economic and financial basis of Confederation and of the distribution of legislative powers in the light of the economic and social developments of the last seventy years." The Report, issued in May, 1940, as the Germans were beginning to sweep on toward Paris, is not only worthy of the magnitude of its assignment but is one of the most valuable government documents in many years and in some of its aspects may prove as important for the United States as for Canada.

Brilliantly written, based on thorough research and investigation, keenly analytical, fully cognizant of economic and cultural as well as of constitutional and political factors, the three chief volumes of more than two hundred pages each constitute a milestone in government reporting. Book I is so expert a pooling of the research work of the Commission's staff in the economic and social developments of the past seventy years and their bearing on the working of the federal system as to constitute an epitome of the history of Canadian federalism. Book II consists of recommendations, while Book III consists largely of relevant statistical data. Nor do the supplementary studies issued in printed or mimeographed form fall far below the main volumes in standard of work or of style.

On the face of its terms of reference the Commission's task was primarily that of financial investigation but actually its work goes to the foundations of the Canadian federal system. In particular, the Commission was instructed to examine the constitutional allocation of revenue sources and governmental burdens to the Dominion and provincial governments; to investigate and determine whether taxation as at present allocated and imposed is as equitable and efficient as can be devised; to examine public expenditures and public debts in general; and last of all, to investigate Dominion subsidies and grants to provincial governments. In completing this investigation, the Commission has given a brilliantly clear picture of the economic background of Dominion-provincial relations, the growth of transportation and the westward march of empire, and the rise of the Canadian social service state in relation to the federal pattern.

The Commission was not merely a fact-finding body whose findings were designed merely to collect dust on library shelves, for the Commissioners were also to make recommendations as to what, subject to the important qualification of retention of the federal system of Canada, would best effect a balanced relationship between the financial powers and the obligations and functions of each government and would lead to a more efficient and economical discharge of governmental responsibilities. Accordingly, the Commission recommended that the financing and administration of such important social services as unemployment insurance and relief, and legislation concerning minimum wages and maximum hours, should be turned over to the Dominion Government. Secondly, the Dominion should take over existing and future provincial debts if approved by a Dominion Finance Commission. Third, the confusing situation now existing in which both Dominion and provincial governments levy income and corporation taxes should be remedied by granting the Dominion the sole right of levying such taxes. Furthermore, inheritance taxes, now subject to the exclusive control of the provinces, should also become the concern only of the Dominion. In return for these financial sacrifices by the provinces, they should receive annual and unconditional grants to bring education and welfare up to an average national standard, and other development and emergency grants. Last of all, arrangements should be permanently made for regular conferences between the Dominion and the provinces.

The path which the Commission trod was full of pitfalls and stumbling-blocks. The Province of Alberta refused to appear or allow its officials to appear before the Commission, while the Province of Quebec allowed the hospitality of the City of Quebec but refused to participate as a province. Last of all, Ontario withdrew its cooperation, so the Commission was obliged to proceed without complete knowledge of how its recommendations would be accepted by the provinces. Nor have the recent developments given much cause for hope as to the immediate acceptance of the recommendations contained in the report, for the conference of January, 1941, broke down after only one day's deliberation.

These outcroppings of what might be called "provincial rights" sentiment serve to remind us how Canadian federalism has developed more in common with American federalism than the propounders of the British North America Act of 1867 might have ever dreamed possible. That act, the antithesis of the American constitution in its federal division of powers, gave broad powers to the Dominion government, with enumerated powers granted to the provinces and with all residual powers given to the Dominion government. It in its turn was to be permitted "to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces." Jealousy soon became apparent on the part of the provinces and this was aided and abetted by the Judicial Committee of the Privy Council in London and the Supreme Court of Canada, which held that the power of the provinces to regulate "property and civil rights in the provinces" was superior to the power of the Dominion to regulate trade and commerce. So the power of the provinces grew, a power reinforced and fortified by the sectional and cultural diversities of Canada.

Apparently in Canada, as in the United States, the force of federalism is far from spent, as the history of the Report of the Royal Commission on Dominion-

Provincial Relations amply proves. Its evidence indicates that the problem in Canada as here is whether rearrangement if not reallocation of governmental functions is possible in accordance with the dictates of modern industrial and economic life and at the same time in accordance with the broad outlines of a federal pattern.

JANE PERRY CLARK.

Barnard College.

Oensinno e o estudo do Direito especialmente do Direito Internacional Privado no Velho e no Novo Mundo, by Haroldo Valladão. 1940. Saõ Paulo: Emprêsa Gráfica Da "Revista Dos Tribunais." Pp. ix, 258.—The author of this book, bearing the title "The Teaching and Study of Law, Especially of Private International Law, in the Old and the New World," is a professor of law in the National Faculty of Law of the University of Brazil at Rio de Janeiro, where he has been teaching Private International Law (Conflict of Laws) for the past ten years. During this time he has displayed, both as teacher and author, prodigious energy in the development of this subject. Latin-American writers naturally look to continental law as a background of their own. Valladão felt, however, that in the Conflict of Laws the Anglo-American system, and especially the law of the United States, should be included as well, and he has been in the habit of devoting several lectures in his course at the University to our law. His interest in the foreign writers led him to visit many of the European universities in 1935 and 1936 and some of the universities of the United States in 1937. On these trips he met the outstanding men in Private International Law, lectured on phases of Brazilian Conflict of Laws in France and Portugal, and familiarized himself with the latest teaching methods in the different countries. The present volume gives an account of his experiences and observations on the trips referred to. But it gives much more. It makes a survey of the teaching and study of law, and especially of the Conflict of Laws, in all countries of the world. Starting with Europe (Italy, Switzerland, France, England, Belgium, Holland, Germany, Central Europe, the Balkan Peninsula, Eastern Europe, Spain, Portugal and Vatican City), he proceeds to Asia and Africa, and winds up his studies with the Americas (United States, Canada, Central and South America).

So far as the countries visited are concerned, our author sets forth his impressions in a very intimate way. We thus learn of his trip from Brazil to the United States by air and his ride to New York on the Florida Special. He tells us of his introduction to the various professors, how he was received, whom he met, and with whom he dined. We are told which of the celebrated French professors attended his lectures, and that he was the recipient of a silver medal from the University of Paris in honor of the occasion. As the title of the book indicates, the author's main interest was the teaching and study of the Conflict of Laws. What he says about the teaching of law, the legal profession, and the state of the law in general is only incidental to the main narrative. Valladão deals with his subject geographically. As he visits each center of learning, he tells us about the professors connected with the institution, or connected with it in the past, who have devoted themselves to the Conflict of Laws. He tells us what they have written and what other part they have played nationally and internationally in promoting the science of Private International Law. The geographic method is followed also with respect to the law faculties which he had not the time to visit or which were located in countries not included in his itinerary.

Professor Beale published in 1916 an extensive bibliography on the Conflict of Laws, including the writers of many foreign countries. Valladão takes us into many other countries and gives us a fuller and more personal picture of the writers. Reference is also made to the different scientific organizations dedicated to the improvement of the law, to the Institute of International Law, the Comparative Law Association, the Academy of International Law and the International Academy of Comparative Law at The Hague, as well as to the League of Nations and the Permanent Court of International Justice.

For us the principal interest of the work, especially at the present moment, lies in the pages dealing with Latin-America. These give a graphic account of the status of the Conflict of Laws in those countries. Pre-eminent among the Latin-American writers on the Conflict of Laws is Bustamante, the author of the Bustamante Code, adopted at the Sixth Pan-American Conference at Havana in 1928 and now in force in many of the Latin-American countries. Some of the other important Latin-American writers on the Conflict of Laws are: Zeballos, Calandrelli, Vico, and Alcorta of Argentina; Pimento Bueno, Bevilaqua, and Octavio of Brazil; Fabrés of Chile; Algara, Verdia, and Zavala of Mexico; Restrepo Hernandez, and Alfred Cock of Colombia; Carrio of Uruguay; and Seijas of Venezuela.

The book contains so much interesting information concerning the Conflict of Laws and the writers on that subject and is written in such an informal and happy vein that it could be read with profit and enjoyment by all interested in the Conflict of Laws of other countries. It is a matter of regret, therefore, that it is written in a language with which only few members of the legal profession in this country are acquainted.

Our heartiest thanks are due to our Brazilian colleague for having given us such an entertaining and comprehensive review of the men whose efforts have been enlisted in the development of the Conflict of Laws.

E. G. LORENZEN.

Yale University School of Law.

Look at the Law, by Percival E. Jackson. 1940. New York: E. P. Dutton & Company, Inc. Pp. 377.—Across the jacket of this volume the publishers pose the query "Can You Get a Square Deal In The Courts of the U. S. A.?" The answer of the text of the book, if at times with qualifications, is No.

How many lawyers will agree? How many laymen whose lot it is to follow the workings of the courts day in and day out—court stenographers, for example—will agree?

The author takes for the theme of his chapters familiar forms of lay criticism of the law. The layman says there is too much law, the layman says the law is uncertain, the law is too rigid, the law is too technical, the law is hypocritical, the law is too slow, the law is too expensive, lawyers are dishonest, judges are corrupt, witnesses are liars. The author is of the same opinion, except as to judicial corruption. At this he balks, although the incidents which he recounts seem to lead quite as plausibly to the conclusion as those which he accepts on the other counts of the indictment. The au-

thor's method throughout is to present a succession of shocking examples to support each particular category of lay criticism. As well, it would seem, might one take a rich collection of schoolboy "howlers" to show that the educational system should be scrapped.

This is not a law book, and there can be no quarrel with the absence of citations. Nevertheless, the way in which some of these shockers are presented provokes an impulse to run them down to see if in the original sources they would show up in quite so lurid a light.

There is a judicious foreword by Arthur Garfield Hays. One could wish that every reader might have the wise cautions of this introduction steadily in mind throughout the pages of the text.

ARTHUR M. BROWN.

Boston.

Mr. Leslie M. Swope, chairman of the tax section of the Pennsylvania Bar Association, writes us regarding a review of Stradley and Krekstein's *Corporate Taxation and Procedure in Pennsylvania* in the December, 1940, number of the JOURNAL:

"I have used the book constantly in practice and find it very helpful. . . The attention to the administrative point of view, criticized by the reviewer, in my opinion is a distinctive feature, which is of great practical advantage to the tax practitioner. . . My examination and use of the book (which is to be completed in a second volume) indicates that all available court decisions relevant to the text have been carefully cited and adequately analyzed.

"It is true that there are 'many questions concerning these taxes' which remain unanswered; but this is due primarily to the infancy of Pennsylvania's new tax laws and to the lack of judicial construction. To say that the authors have not 'attempted to answer any of the questions which ordinarily confront the taxpayer' is, in the judgment of the undersigned, an unfair criticism and one that creates a false impression. Throughout the text, the authors discuss and take positions concerning questions upon which the law is settled. Many of these questions are those which ordinarily confront taxpayers. For this attempt alone, the book is timely and meritorious."

Illinois Chief Justice Dies

Norman L. Jones, Chief Justice of the Supreme Court of Illinois died November 15, 1940. Appropriate memorial services were held in the Supreme Court, February 13. Judge Jones was admitted to the Illinois Bar in 1896. For many years he was a partner of the late Henry T. Rainey, one-time Speaker of the House of Representatives in Washington. From 1914 to 1931 Judge Jones was on the Circuit Court bench in his Circuit. He was elected to the Supreme Court in 1931, and was serving as Chief Justice at the time of his death.

Dean of American Bar Dies

Ex-Judge Henry Stoddard, of the New Haven, Conn., Bar died February 8. He has been called the "Dean of the American Bar," since he was in active practice for 76 years. He was born in 1843 and admitted to the Bar in 1864. For many years he served as counsel for Yale University. For six years he sat on the Superior Court in Connecticut, and during that time was frequently called to sit on the Supreme Court.

Annual Meeting - Indianapolis, September 29 to October 4

THE Sixty-fourth annual meeting of the American Bar Association will be held at Indianapolis, September 29 to October 4, 1941. Further information about the meeting will be given in the JOURNAL from time to time. The usual Advance Program will be sent out to members.

Hotel Accommodations

Official Headquarters—Claypool and Lincoln Hotels

Hotel accommodations, all with private bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin-beds for 2 persons	Two-room suites (Parlor and 1 bedroom)
Antlers (750 N. Meridian)	$3.00–3.50	$4.50–5.00	$4.50–6.00	
Claypool (Wash. & Ill. Sts.)	3.00–4.50	4.50–6.50		
(Advance reservations have already exhausted twin-bed rooms and suites.)				
Columbia Club (Monument Circle)	3.00–4.50	6.00–6.50	5.00–7.00	$14.00
Harrison (Capitol & Market)	3.00–3.50	4.50–6.00	6.00	
Indianapolis Athletic Club (350 N. Meridian St.)	2.75–4.00		6.00	
Lincoln (Wash. & Ill.)	3.00–4.00	4.50–6.00	5.50–7.00	
Marott (Apt. Hotel) (2625 N. Meridian)	3.00	6.00	6.00	7.00–9.00
Severin (201 S. Illinois)	2.50–4.00	4.00–5.00	5.00–7.00	10½-12½
Spink Arms (410 N. Meridian)	3.00	5.00	6.00	7.00
Warren (123 S. Illinois)	3.00–4.00	4.50–6.00	5.00–7.00	
Washington (34 E. Washington)	3.00–4.50	4.50–6.00	5.50–6.00	6.00

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

Bachrach

George Richard Grant

DEATH deprived the Association of one of its most devoted and active members and officers, in the passing of George Richard Grant, of Wellesley Hills, Massachusetts, who was State Delegate from Massachusetts and member of the Board of Governors from the First Circuit.

He was born in Cape Vincent, Jefferson County, in northern New York State, on November 16, 1882, the son of George and Frances M. (Howard) Grant, both of whom had been born in Jefferson County. After early education in public schools at Cape Vincent, he went to Cornell University on a competitive scholarship, and received his A. B. degree with the class of 1904. He received his law degree from the University of Buffalo in 1906.

After practicing law three years in Buffalo, he became a member of the staff of the Public Service Commission of the State of New York for the Second District (of state). In 1913 he resigned to become associated with the law work of the Eastern Group of Bell Telephone Companies, in New York City, and soon became an expert in the new field of regulatory law as to communications. In 1917 he became General Attorney for the New England Bell Telephone Company, in Boston, in which position he tried or was responsible for all rate cases and litigation as to company practices before the Public Service Commissions of Massachusetts, Maine, Vermont, New Hampshire, and Rhode Island. His record of success, through fairness and common sense, was unusual.

In 1912 he was married to Anne K. Parker, of Three Mile Bay, New York. Their two sons are George R. Grant, Jr., now a practicing lawyer in Manchester, New Hampshire, and Francis Howard Grant, who is still in school. His first wife died in 1936. In 1939 he was married to Miss Marion Kenniston, of Dorchester, Massachusetts.

He was an active member of the Boston Bar Association and the Massachusetts Bar Association, and attended American Bar Association meetings regularly for many years. He strongly supported the reorganization of the Association on a representative basis, and was active in the entertainment of the 1936 convention in Boston. In that year he was Chairman of the Section of Public Utility Law. Since 1936 he had been State Delegate from Massachusetts. In 1939 he was elected to the Board of Governors. Although ill, he attended the 1940 meeting in Philadelphia, and made the motion, from the floor, to "table" the highly controversial resolution as to a "third term" for Presidents of the United States. Strongly opposed as he was to a "third term" he spiritedly took the lead to exclude from the deliberations of the Association so divisive an issue which was in course of submission to the electorate.

He was a member of the Dalhousie Lodge of Masons and of the Cornell Club of New England, which he had served as President. He had a capacity for friendship and for finding on middle ground an acceptable solution for controversies. His devotion and diligence in behalf of the organized Bar will be greatly missed.

Report of Solicitor General's Office

The office of the Solicitor General of the United States is without doubt the largest law office in the country devoted primarily to Advocacy. For this reason an account of the work of that office is of interest to the Bar of the entire country. The major part of the duties of the Solicitor General is the conduct of the Government litigation in the Supreme Court. He is the *Barrister* or *Advocate* of the United States; the Attorney General being the *General Counsel* to the Government.

The report of the Solicitor General for 1940 presents some interesting information about the business of the Supreme Court. There is first presented a table called *"Total Litigation Statistics,"* which includes both Government and non-Government cases over a period of ten years, and is as follows:

TABLE I

	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939
Cases at close of preceding term pending	173	123	120	110	88	96	90	98	65	85
Cases docketed during term	843	880	896	1,003	934	980	949	971	942	978
Total	1,016	1,003	1,016	1,113	1,022	1,076	1,039	1,069	1,007	1,063
Cases disposed of at the term	893	883	906	1,025	926	986	941	1,004	922	942
Cases carried over to the next term	123	120	110	88	96	90	98	65	85	121

Table II is particularly interesting because it shows what might be called "batting averages" for all litigation in the Supreme Court during the last five years. [The table actually covers 15 years but space requirements prohibit giving it in full.]

TABLE II

	1935		1936		1937		1938		1939	
	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent	Number	Per Cent
Appellate cases disposed of	986	100	941	100	1,004	100	922	100	942	100
A. Obligatory jurisdiction.	117	12	124	13	121	12	120	13	89	9
Appeals disposed of after argument	63	6	65	7	53	5	62	6	34	3
Appeals disposed of without argument	47	5	58	5	64	6	55	6	55	6
Certificates	7	1	1	1	4	1	3	1	...	...
B. Discretionary jurisdiction	869	88	817	87	883	88	802	87	853	91
Certioraris disposed of after argument[1]	142	14	137	15	154	15	121	13	137	15
Certioraris disposed of without argument	10	1	9	1	11	1	5	1	26	3
Petitions for certiorari denied	706	72	665	70	708	71	665	72	662	70
Petitions for certiorari dismissed	11	1	6	1	10	1	11	1	28	3

LEADING ARTICLES IN CURRENT LEGAL PERIODICALS

By Kenneth C. Sears
Professor of Law, University of Chicago

CRIMINAL JUSTICE

Wrongful Convictions, by Max Hirschberg, in 13 U. of Colorado Rocky Mountain L. Rev. 20 (December, 1940.)—The author was formerly a criminal lawyer in Munich, Germany. Now he is in New York. Believing that justice cannot exist under a dictatorship, he presents a study that would be "impossible" in a Fascist country. Here are some compliments for the Anglo-American system. (1) Its "system of cross-examination is superior to the European system, where the judge handles the hearing." There the judge can "devote only as many hours on one case as an American court devotes days or even weeks." (2) Europe has produced no work on judicial proof equal to Wigmore's Principles of Judicial Proof. The methods of precision worked out by Wigmore and other American scientists support the author's ideas in a way he never hoped for in Europe. Here are the complaints from which the United States is not free, even though most of the wrongful convictions that are summarized occurred in Europe and have been set forth by others except cases which occurred in the author's practice: (1) There are two reasons for wrongful convictions; (a) the erroneous notion that in criminal law probability instead of certainty is enough; and (b) criminal justice does not take enough consideration of the exact results of modern criminology. (2) In particular, complaint is made of confessions, inferences from lies by the accused and his witnesses, mistaken identification, children as witnesses, expert witnesses, and the suggestive influence of the press. Aside from the possibility that the author seems to be something less than a careful scientist in places, what is his specific program? The answer is: (1) be modern and use the methods of precision as far as possible; and (2) inflict no death sentence until every doubt, not merely every reasonable doubt, has been overcome. Thus we have what is to a large extent an argument against the death penalty. But the author has not proved his starting thesis that "wrongful convictions are not unavoidable."

LEGAL BIOGRAPHY

Mr. Justice Black and the Supreme Court, by Vincent M. Barnett, Jr., in 8 U. of Chicago L. Rev. 20. (December, 1940.)—Interesting and well written is this analysis of the brief judicial career of a much-criticized man. It is sympathetic; it is also laudatory. Yet there is a disclaimer that the primary purpose is to defend him. Rather it states that Mr. Justice Black "has demonstrated that he is fully qualified to perform his duties" and then proceeds to discuss his judicial philosophy. As to Federalism he would permit the states to have wide powers when the national government has not acted without depriving Congress of wide powers when it decides to act. When Congress acts, conflicting state legislation would be invalid. He would not permit corporations to claim the protection of the Fourteenth Amendment. Not prevailing in this he has been in favor of a much more tolerant attitude than has prevailed in the past toward state legislation when it has been attacked because of this amendment. However this conspicuous toleration does not exist for legislation that restricts civil liberties. There, at least, he has favored substantive as well as procedural due process. Despite the hullabaloo over his membership at one time in the Ku-Klux Klan, he has been as considerate of protection for Negroes as any other member of the Court. As to inter-governmental tax immunity, Black's view, "expressed first in a separate concurring opinion," has become essentially the view of the Court. However, there appears to be one sour note in this complimentary article when its author remarks concerning Black's dissenting opinions that they did not affect the result in the particular case, "and it may be doubted whether Black would have effected such a sweeping change if he had been writing a majority decision."

LEGAL PHILOSOPHY

A Review of Legal Realism, by Walter B. Kennedy, in 9 Fordham L. Rev. 362. (November, 1940.)—An opponent of legal realism concedes that it has "a place in the legal order provided that it keeps its place." But it "has not captured the fancy or aroused the sustained interest of the Bench and Bar." Why? There are four reasons for this. (1) The realists, despite their vaunted skepticism, have too much faith in unscientific hypotheses. They frequently fail to exhibit a truly scientific attitude. (2) There is overemphasis on facts and fact-finding with a tendency toward a fact-fetish. "Let fact-finding go forward without limit" but let there be no consequent submersion of principles and rules. (3) The realists have accepted too generously a mechanistic psychology "which tends to minimize intellect as the governing agency in the fabrication of judicial opinions," and have substituted personal impulses, subconscious factors, etc. (4) A more recent indulgence is in the science of semantics. This is not bad unless carried to an extreme. A full sweep would remove "practically every legal concept of the common law" . . . In opposition to these extreme notions the author offers the beacon light of idealism, a belief that we can and will find justice under law in the Americas today.

MUNICIPAL CORPORATIONS

Progress in Solving Municipal Insolvency Problems, by Edward J. Dimock, in 27 Virginia L. Rev. 193. (December, 1940.)—Before the current depression we attempted to solve municipal insolvency problems by using mandamus to compel tax levies. As a matter of discretion, a judgment could be spread over the years by a series of tax levies. This resulted in preferences and "expensive guerilla warfare." The past decade developed new methods. New Jersey established a

municipal finance commission which, in the case of Asbury Park, produced a plan that would treat the creditors equally. A federal court cooperated with this plan by an exercise of its discretion as to the issuance of mandamus. But the use of this plan has been seriously questioned in two later federal decisions, one of which rests upon a questionable application of *Erie R. R. v. Tompkins*. As a result the only clear way to relief in solving the problem is to resort to the National Municipal Bankruptcy Act. There is need, however, for the passage of the Jeffries Bill which has been approved by the American Bar Association. This bill would permit a stay of four months after a municipal creditor attempts to obtain a preference. Thus a municipality may obtain a period within which to obtain the consent of 51% of its creditors to a plan of refinancing that can be presented in a bankruptcy proceeding. But the present Municipal Bankruptcy Act will cease to be effective on June 30, 1942, and it is probable that little more will be done until there is another municipal crisis.

PRIVATE CORPORATIONS

The Corporation Executive and His Profit-Sharing Contract, by George T. Washington, in 50 Yale L. Jour. 35. (November, 1940.)—There are social and economic problems involved in this modern device of business tycoons having a fat salary no matter what happens and a bonus in addition, if the profits are large. But these problems receive very little attention. Some consideration is given to the American Tobacco Case and the "substantial public sentiment against the use of percentage compensation contracts." In the main, however, this discussion is concerned with the legal problems involved in drafting profit-sharing contracts. Various provisions of a typical profit-sharing contract are set forth and discussed and it is to be supposed that this will be of interest to Wall Street lawyers and their brethren. Some tycoons are trying to guard themselves, but not their employees apparently, against the consequences of a currency inflation. Such striving after the luxuries of life is apt to fill some readers with a gloom comparable to that caused by reading the current war news. The author seems to be an optimist. This is his last expression: "Nevertheless, it is submitted that a profit-sharing contract fairly drawn and fairly adopted, with careful observance of the warning given by Mr. Justice Stone, can be and should be a legitimate source of satisfaction to the legal draftsman."

PUBLIC LAW

Crisis Legislation in Britain, by Cecil T. Carr, in 40 Columbia L. Rev. 1309. (December, 1940.)—Amid the current claims that the Lease-Lend Bill is the beginning of the end of democracy for us, the discussion of English legislation by an English barrister and writer may give us a wider perspective. The extraordinarily wide powers which have been conferred by Parliament upon the executive seem to be an improvement upon the hotly disputed royal proclamations of the seventeenth century. Observe that in England during the last thirty years there have been four major instances of Acts providing for extensive codes of regulations. The first two were the Defense of the Realm Act, 1914, and the Restoration of Order in Ireland Act, 1920. The third, Emergency Powers Act, 1920, is permanent law but it remains dormant until called into use by a proclamation. It was used in 1921, 1924, and 1926 because of strikes. This Act is regarded in England "as a sensible weapon to keep in the cupboard." The fourth is the Emergency Powers (Defense) Act, 1939. Under this last Act prior approval of codes is not required but the regulations are to be presented to Parliament as soon as made and then they can be annulled by an adverse resolution in either House within twenty-eight days. Nor have the courts ceased to function in matters of public law. In August, 1940, "Mr. Justice Bennett held part of Defense Regulation 55 to be ultra vires." This resulted in a substantial change in the regulation. Thus the author, though anxious on account of the undeniable steps in the direction of dictatorship, does not appear to be pessimistic. "In the eternal dispute between government and liberty, crisis means more government and less liberty. . . . Free peoples, when they temporarily surrender freedom, will expect to see their inheritance restored to them when the storm is over."

TRADE REGULATION

The ASCAP-NAB Controversy—The Issues; The ASCAP View, by E. C. Mills; *The NAB View*, by Neville Miller, in 11 Air Law Review 394 (October, 1941.)—The two statements are by partisans but the essence of the controversy seems to be, who gets the "dough." ASCAP justifies its existence because the individual copyright owner cannot successfully prevent infringement. Thus, compositions are pooled and all are made available under a single annual license. ASCAP is not the only, but it is the most important society of this sort in this country. It has licensed 30,000 public amusement enterprises in the United States. Prior to 1932, ASCAP obtained a "sustaining" fee from the broadcasters of nearly a million dollars annually. In 1932 ASCAP demanded an additional payment of 5% of the gross receipts from the sale of broadcasting time. NAB had no appreciable supply of music and it yielded to a modified demand. However, it disapproved of the principle that broadcasters should have to pay the percentage "regardless of whether the time was consumed in playing ASCAP music, non-ASCAP music, or no music at all." In 1935 a suit by the United States against ASCAP for violation of the Sherman Act went to trial. It is still pending. In 1939 NAB sought to renew the contract with an important change that would make the compensation depend on the amount of time devoted to ASCAP music rather than upon the total amount of broadcasting time. This was called the "per use" system of payments. ASCAP, claiming that the large broadcasting chains were retaining the lion's share of the proceeds and yet avoiding payments to the copyright owners, proposed a plan whereby the fees would be reduced to the small and medium sized stations and maintained at the same level on stations with the higher incomes. But, according to NAB, there were to be new fees on the networks "of 7½% of the entire network income." These new fees were to be paid at the source and were not to be passed on to the stations in the network. NAB, claiming that this would double the payments received by ASCAP and that the new fees would be passed on, proceeded to organize Broadcast Music, Inc. (BMI) in order to have its own source of music. These views were written before the contract expired December 31, 1940.

JUNIOR BAR NOTES

by James P. Economos
Secretary of the Junior Bar Conference

LEWIS F. POWELL, JR., Richmond, Va., National Chairman, has summoned his Executive Council for a two day mid-winter meeting to be held on Saturday and Sunday, March 15 and 16, 1941 at the Edgewater Beach Hotel, Chicago, Ill. They will study the progress that has been made in executing the Conference program, receive reports from National Directors and Committee Chairmen, and consider plans for the Annual Meeting in Indianapolis.

Mid-year reports received from State Chairmen throughout the country indicate that the Council must devote attention to the problem arising out of the uncertainties created by the general unsettled international situation and its effect on the young lawyer. It is also interesting to note the greater use of radio facilities in promoting the public information program.

Radio Programs

State Chairman Nathaniel Wilson Cabell, Charleston, S. C., advises that the Public Information Program recently launched in Charleston has been favorably received and is assured of being successful. It consists of a weekly radio broadcast over Station WCSC at 7:45 P. M. for the presentation of talks by prominent individuals, debates and dramatic skits. State Public Information Director Charles H. Gibbs, Charleston, S. C., appeared on February 4th in the first presentation and spoke about the Junior Bar Conference, its aims and the purpose of the radio series. On February 11th, the program featured George L. Buist, a member of the Board of Governors, who delivered an excellent talk on "The Constitution."

The Junior Section of the St. Louis Bar Association under the leadership of Bertram W. Tremayne, Chairman, is presenting a series of radio broadcasts entitled: "The Lawyer Speaks." Talks on Civil Rights, National Defense, preventative legal advice and non-technical history of a lawsuit and many other topics have been scheduled for early presentation.

Regional Meetings

Philip H. Lewis, Topeka, Kansas, Chairman of the Committee in Cooperation with Junior Bar Groups has just completed a fifteen-day trip through the far western states. He was the official representative of the Conference at three regional meetings of Junior Bar executives held in Los Angeles, Calif., Portland, Ore., and Denver, Colo., on February 20, 24 and 27 respectively.

The Los Angeles meeting brought together officers and active workers in Junior Bar organizations from the states of California, Arizona and Nevada. A round table discussion concerning the coordination of local, state and national bar programs received serious attention. Harold W. Schweitzer, 9th District Council Member, presided as Chairman. Those present then joined with the Los Angeles Bar Association in honoring President Lashly at a dinner held in the Biltmore Hotel.

Thomas J. White, Oregon, State Chairman, ably handled arrangements for the Portland meeting which included representatives from Washington, Idaho, and Montana. Monday, February 24th, was devoted entirely to business sessions and the next day to activities of a more social nature. Mr. Lewis was the principal speaker of the session and outlined the objectives of the Conference program.

Colorado, New Mexico and Wyoming Junior Bar members congregated at the Denver regional meeting. Edward J. Ruff, Chairman of the Colorado Junior Bar Conference acted as host to the visitors. At the conclusion of their meeting, they joined in the program presented by the Committee on Bar Organization Activities. These are very active states and greater interest in the current Conference program is anticipated.

The Memphis Regional Meeting is scheduled for April 3 and 4 and the Richmond Regional Meeting has been set for April 7. Chairman Lewis F. Powell will be in attendance at both meetings.

Stop-Overs

The Kansas Junior Bar Conference held its first state conclave on February 15 at the Allis Hotel, Wichita. Philip Lewis, vice chairman of the Conference, and James Fellers, Tenth Circuit Council member, reported on the National Defense topics used in the Public Information Program. A legal institute under the leadership of George B. Collins, of Wichita, was held on the topic: "Practical Problems in Oil and Gas Leasing."

Immediately following this meeting Philip Lewis stopped off at Laramie, Wyo., on February 17, and spoke on the purpose of the Junior Bar Conference at a meeting arranged at the University of Wyoming Law School. Vernon G. Bentley, who has recently been appointed State Chairman for New York, was in charge of the program. The next day, February 18, C. J. Parkinson, State Chairman of the Utah Junior Bar Conference, introduced the members of his Council to Philip Lewis. They reported that they had succeeded in having the Legislative Reference Bureau Bill passed by the Utah Senate, and that they are now proceeding to secure its passage in the House.

New York Monthly Luncheon

From time to time reference has been made to the luncheons which have been held monthly, except during summer months, in downtown New York City since January, 1940. They were originally instituted as a means of stimulating interest in the Junior Bar Conference and increasing the membership in New York City, but now luncheon series become a major activity in the New York City area.

The speakers have included Morris Ernst, who spoke on some problems of civil liberties; Professor Philip Jessup of Columbia, who spoke on certain legal aspects of neutrality; Mr. Elbridge Stein, an expert on the detection of fraudulent documents; Mrs. Elinore Herrick, original director for the N.L.R.B., in the New York City area; Major Knowlton Durham, who spoke on military law; and Oren Root, Jr., who stressed the importance of lawyers devoting attention to political activity.

After a full year of successful luncheons, it has been determined to set up a special luncheon committee. Such a committee has recently been appointed, the members of which are: Curtis Heath, Francis Shackelford and Richard Hogue, and it is now planned that the monthly luncheons shall continue indefinitely, except during summer months.

Junior Barristers

Harold W. Schweitzer, Los Angeles, Calif., has recently filed his report with the Los Angeles Bar Association concerning his stewardship as Chairman of the Junior Barristers. He reports that seventy radio broadcasts were presented and sixty rostrum addresses made in furtherance of their Public Information Program.

Washington Letter

Defense Problems Inquiry

A TIMELY review of the sundry problems involved in national defense is being undertaken by the Judiciary Committee of the House of Representatives. There is not much to be said about this inquiry because, as yet, it has not made much news. It is understood that, in December, Chairman Hatton Sumners addressed letters to the heads of some of the departments and other agencies whose work especially touches defense matters; and that, in view of the replies and suggestions received, he now is ready to take up for solution such problems on that subject as may require further legislation.

Among the witnesses who have appeared up to the time this is written are Assistant Attorney General Thurman Arnold and member of the advisory Commission to the Council of National Defense, Sidney Hillman. It is likely that William S. Knudsen, member of the Advisory Commission to the Council of National Defense, will appear as a witness before the Committee in the near future. It is a good omen for the cause of national defense that this inquiry is in charge of the House Judiciary Committee, in whose chairman all parties have confidence and who will give the inquiry a high standing before the country as a whole, it being universally understood that he will proceed in a judicious manner and will be interested in attaining fair results rather than in fanfare.

Monopoly Committee Monographs

Some of the interesting monographs yet to be issued by the Temporary National Economic Committee, generally known as the Monopoly Committee, are on the subjects: "Relative Efficiency of Large, Medium-Sized, and Small Businesses," "Some Problems of Small Business," "Price Discrimination in Steel," "Taxation of Corporate Enterprise," and "Profits, Productive Activities, and New Investment." It is understood that the monograph on steel, prepared by the Federal Trade Commission, was substituted for one previously planned on government competition with private enterprise, which was dropped.

The recently issued monograph on the Trade Association Survey is number 18. It was prepared in the Department of Commerce from data supplied by lengthy questionnaires sent out in 1938; and may be had at fifty cents per copy from the Superintendent of Documents, Government Printing Office. The pamphlet covers such topics as the general characteristics of trade associations, their scope of activity, trade practices in general, trade practices of the Sugar Institute, trade statistics including price and bid information, and uniform accounting including cost statistics and cost studies. A description of this monograph, issued by Chairman O'Mahoney, states that the typical national and regional trade association is small and that there is ground for believing that in recent years relatively few have engaged in collusive restraints of trade.

In the eighth and final chapter of the pamphlet, entitled "Summary and Conclusions," there are discussed collusive and non-collusive efforts to affect competition within an industry. The thought is suggested that a trade association is an intermediate stage between the integration of an industry's activity, through merger and consolidation into a single or small number of units, and the maintenance of many completely independent and competing enterprises. There is suggested a new federal agency which might have two functions: first, the ascertainment of how far competition leads to results contrary to the public interest and how far, if at all, and on what conditions, anti-trust laws should be relaxed; and second, the improvement of the statistics of trade associations, with more publicity, particularly for the benefit of buyers. A final conclusion is that the best intermediate step might be to sharpen the anti-trust laws with definitions of what is illegal and to "open the way for more flexible treatment of industry's problems where processes of free competition appear to lead to social waste and instability."

West Virginia Senatorship

A progress report is in order on the contest to determine who shall be the junior Senator from West Virginia. As explained last month, the outgoing Governor of West Virginia, whose term ended upon the qualification of the new Governor very early in the morning of January 13, 1941, appointed Clarence E. Martin, former President of the American Bar Association; and the new Governor, promptly upon his taking that office, appointed Dr. Joseph Rosier, President of Fairmont State Teachers' College. Neither appointee, as yet, has taken the oath, pending the determination by the Senate as to which man is entitled to the seat.

The Senate Committee on Privileges and Elections met February 13th, ordered the record in the case printed and recessed to February 27th, at which time it is anticipated the Committee will make its report. It is understood that there is no prescribed procedure nor precedent to be followed by the Senate in its consideration of the case.

Straws in the Gale

Of what value are the straw votes? Should they be limited to answering a very simple type of question? Is it possible to state even that sort of question in a way so as to be fair to all viewpoints? Should polls be subject to no other restriction than the ultimate weeding out by public sentiment of any of them which may not be at all times perfectly fair? Or should they be subject to regulation designed merely to keep their methods and size of coverage aboveboard and always open to the public? Is it likely that any regulations which may be imposed can be abused with greater detriment to the public interest than may result from the polls unregulated?

These questions and others may be answered to the satisfaction of Congress after the preparedness legislation program is out of the way. There are several resolutions which may bring the matter to an issue. Senator McKellar, of Tennessee, would have a special committee of three Senators appointed to investigate first regarding polls, straw ballots and published reports on election contests; and second, those which "have purported to measure or indicate the status of public opinion about matters of national importance." The expense fund for this inquiry would be $10,000.

Senator Holman and Representative Pierce, both of Oregon, have introduced identical resolutions. It would provide a special joint committee of five Senators and five Representatives "to investigate the conducting of polls purporting to measure public opinion with respect to questions or issues which have or may have a bearing upon any election held to fill any office under the government of the United States." The joint committee also would inquire as to how the polls are taken "with special reference to the manner of framing questions contained in ballots or inquiries, the method of selecting persons to whom ballots or inquiries are sent and the reason for conducting such polls."

A common feeling among those members of Congress disposed to criticise

the polls, is that they presume to represent the convictions of people generally throughout the country who have not studied particular and intricate legislative problems, such as the lease-lend bill, and are not qualified to pass on them.

Senator Wheeler, of Montana, expressed the firm conviction that "polls on legislation are apt to be a dangerous thing for democracy in the United States." He continued: "The Gallup Poll may be all right when it is on a question of who's going to win an election—what the popular vote is between Smith and Jones when the people have largely made up their minds. However, when it comes to the lend-lease bill, it is impossible for the average person throughout the United States to understand the bill and its implications."

Senator Capper, of Kansas, expressed confidence in the Gallup and Fortune polls, especially. He indicated the belief that an investigation by a congressional committee might establish the reliability of certain polls and help to weed out unreliable polls by showing how the canvass was made. He said that he is "always in favor of getting the facts."

House Majority Floor Leader John W. McCormack, of Massachusetts, said he could not see why there should be an investigation of the polls, that they represented a legitimate field, and should be helpful in arousing public interest and disclosing public sentiment. He continued: I am not in favor of indicting any one without cause and, before there is an investigation, I believe that I should be definitely shown that something is wrong about these polls."

The views of House Minority Floor Leader Joseph W. Martin, Jr., of Massachusetts, were thus expressed: "I don't object to these polls. I do not think they influence members of Congress very much. I do not see where we have a patent on expressing public opinion. Any one can make a poll and we cannot stop him. Any organization has a right to function as long as it is straightforward and reliable—and when it isn't the public soon knows it."

Representative Walter M. Pierce, of Oregon, who is sponsoring the proposal for investigation in the House, said: "These polls are getting to be an awful racket, so we want those who conduct them to come here before a committee of Congress and tell how they make the poll. George Gallup has written to me that he would be glad to come and testify before such a committee. I think that since the polls are quoted everywhere, and even on the floor of Congress, and since the people have come to place reliance on what these polls show, we should have a showdown and see just how they are made, and whether they are reliable."

Senator Robert A. Taft, of Ohio, expressed his view in these words: "Polls serve a useful and interesting purpose in providing information about public opinion. When they relate to an issue, clearly defined, on which there has been much discussion, they are likely to be quite accurate. On the other hand, casual opinions obtained from people who have not thought about the subject, and opinions in reply to confused questions, which do not state a definite issue, are not of much value. It is seldom that polls obtain public opinion on the exact question which a Senator or member of Congress has to vote on. While polls serve a useful purpose, I often object to the use which is made of them by others."

How Old is the Law?

You may read that a certain principle of law is so many thousand years old, or was developed at a certain period of history which likewise dates it. But do you really sense its antiquity when expressed merely in figures of by dates?

ONE IN '41

A REMINDER—

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However, when you find that the law has definitely outlived a certain word or technical expression, you feel some perception of its age, even though that word may be barely old enough to be decently buried.

For example, there is the expression, "Court Hand" which appears in the modern edition of the Code of the District of Columbia, even though its reference does bear a respectably ancient date, 1733, being from 6 Geo. 2, c. 14, sec. 5. In an earlier section there was a requirement that writs, pleadings, etc., should be in the English tongue and language only and in words at length and not abbreviated; and then section 5 continued that "no penalty or punishment shall be incurred by virtue of section 2 of this title, for any other offence than for writing or printing any of the proceedings, or other the matters and things above mentioned, in any hand commonly called Court Hand, or in any language except the English language."

You find upon research that court records were written in "court hand" in the old English practice down to the reign of George II, and that it had great strength and compactness and gave the ancient records a quality of durability not since accomplished until the common use of printing or typewriting. And then you find that that modernist, Blackstone, disapproved of it and in his third Commentary, p. 323, thus spoke of "The ancient immutable court hand in writing the records or other legal proceedings; whereby the reading of any record that is fifty years old is now become the object of science, and calls for the help of an antiquarian."

Blackstone Down to Date!

ONE of the strange and yet significant incidents of our Anglo-American Law is the continuing influence and vitality of Blackstone's Commentaries. Our readers will have noticed in our February issue the announcement of a new moderate-priced one volume edition of the great law writer. Indeed there seems to be a revival of interest in Blackstone, as this new publication testifies.

Nominating Petitions

Massachusetts

TO THE BOARD OF ELECTIONS:

THE undersigned hereby nominate Joseph N. Welch of Boston for the office of State Delegate for and from the State of Massachusetts, for the vacancy now existing in the term to expire at the adjournment of the 1941 Annual Meeting, and for the regular three-year term beginning at the adjournment of the 1941 Annual Meeting:

Messrs. Harvey H. Bundy, Charles B. Rugg, Raymond S. Wilkins, Robert G. Dodge, Daniel J. Lyne, James M. Graham, Henry E. Foley, Frank W. Grinnell, William H. Best, Arthur D. Hill, Eliot N. Jones, Joseph Wiggin, Arthur J. Santry, Stoughton Bell, Fitz-Henry Smith, Jr., Benjamin Levin, Haskell Cohn, Herman A. Mintz, George P. Drury, Stuart Craig Rand, Samuel Hoar, Leonard Wheeler, Jr., R. H. Davison, Leslie P. Hemry, John E. Buddington, Paul B. Sargent, and Reginald Heber Smith, of Boston;

Messrs. Roscoe Pound, Samuel Williston, Austin W. Scott, and John M.

Notice By the Board of Elections

The following states will elect a State Delegate for a three-year term in 1941: Alabama; California; Florida; Hawaii; Kansas; Kentucky; Massachusetts; Missouri; New Mexico; North Carolina; North Dakota; Pennsylvania; Tennessee; Vermont; Virginia; Wisconsin; Territorial Group (Alaska, Canal Zone, Philippine Islands).

The following state will elect a State Delegate to fill a vacancy for the term to expire at the adjournment of the 1942 Annual Meeting: Illinois.

The following states, in addition to electing a State Delegate for a three-year term, will also elect a State Delegate to fill a vacancy expiring with the adjournment of the 1941 Annual Meeting: Massachusetts; New Mexico; North Dakota; Tennessee; Vermont; Territorial Group.

Nominating petitions for all State Delegates to be elected in 1941 must be filed with the Board of Elections not later than May 1, 1941. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. Nominating petitions, in order to be timely, must actually be received at the headquarters of the Association before the close of business at 5:00 P. M. on May 1, 1941.

State Delegates elected to fill vacancies take office immediately upon the certification of their election. State Delegates elected for a three-year term take office at the adjournment of the 1941 Annual Meeting of the Association, which will be held the week of September 29th.

Attention is called to Section 5, Article V, of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group).

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing.

Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition. While there is no restriction on the maximum number of names which may be signed to a nominating petition, in the interest of conserving space in the Journal the Board of Elections suggests that not more than fifty names be secured.

Nominating petitions will be published in the next-succeeding issue of the American Bar Association Journal which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the Journal. In view of the fact that the time for filing petitions expires on May 1, which normally would be the date on which the May issue of the Journal would be mailed, it is recommended that as far as possible nominating petitions be mailed in time to be received at the headquarters' office on or before April 15, 1941.

Ballots will be mailed to the members in good standing accredited to the States, in which elections are to be held, within thirty days after the time for filing nominating petitions expires.

EDWARD T. FAIRCHILD, Chairman.

Maguire, of Cambridge;

Messrs. Charles P. Ryan, Frank M. Silvia, Harold S. R. Buffinton, John B. Cummings, and Harold E. Clarkin, of Fall River;

Mr. Henry R. Mayo, of Lynn;

Messrs. Morris R. Brownell, John H. Clifford, and Bryant Prescott, of New Bedford;

Messrs. Horace E. Allen, Julius H. Appleton, William W. Yerrall, Alfred Bettigole, and Raymond A. Bidwell, of Springfield;

Messrs. Frank C. Smith, Jr., James A. Crotty, and Edward T. Esty, of Worcester.

Virginia

TO THE BOARD OF ELECTIONS:

THE undersigned hereby nominate Thomas B. Gay of Richmond for the office of State Delegate for and from the State of Virginia:

Messrs. Wm A. Stuart and Preston W. Campbell, of Abingdon;

Messrs. Gardner L. Boothe, Henry P. Thomas, and John Barton Phillips, of Alexandria;

Mr. Laird L. Conrad of Harrisonburg;

Messrs. S. H. Williams, John L. Abbot, S. V. Kemp and James R. Caskie, of Lynchburg;

Messrs. Braden Vandeventer, James Mann, S. Heth Tyler, Leigh D. Williams, Tazewell Taylor, James G. Martin, IV, Thomas H. Willcox, T. D. Savage, and R. M. Hughes, Jr., of Norfolk;

Mr. Howard C. Gilmer, Jr., of Pulaski;

Messrs. A. S. Buford, Jr., C. M. Dozier, William A. Moncure, Jr., Legh R. Page, Henry C. Riely, J. Vaughan Gary, J. R. Tucker, J. Kent Rawley, W. W. Martin, Collins Denny, Jr., Stuart G. Christian, J. Jordan Leake, Joseph F. Hall, Lewis C. Williams, Thomas B. Snead, Robert T. Barton, Jr., Bernard Meredith and E. Randolph Williams, of Richmond;

Messrs Geo. S. Shackelford, Jr., William D. Staples, Harvey B. Apperson, E. W. Poindexter, Frank W. Rogers and Lucian H. Cocke, Jr.. of Roanoke;

Mr. J. M. Perry, of Staunton;

Mr. James H. Corbitt, of Suffolk;

Messrs. William H. White, Jr., and F. D. G. Ribble, of University;

Mr. Channing M. Hall, of Williamsburg; and

Mr. S. B. Campbell, of Wytheville.

(In the interest of conserving space in the JOURNAL, the names of only fifty signers to Mr. Gay's petition are being published, by suggestion of the Board of Elections.)

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